IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

KELLY LAWS, Petitioner, vs. WILLIE GRAYEYES, Respondent.	ORDER DENYING APPLICATION FOR ATTORNEY FEES AND COSTS Case No. 180700016 Judge Don M. Torgerson

This matter is before the Court on *Respondent's Motion Respecting Scheduling Procedures for Resolution of Attorney Fee Dispute* and his request for attorney fees contained in *Respondent's Application for Costs and Fees*. Since Respondent has fully briefed his position, the Court rules without additional briefing or argument.

PROCEDURAL BACKGROUND

After Laws filed his notice of appeal of the Court's *Ruling and Order* dated 1/29/19, Grayeyes requested attorney fees for this case based on three equitable doctrines: bad faith, private attorney general, and substantial benefit. Laws has not yet responded to the original request for fees because litigation over attorney fees was stayed while the Utah Supreme Court considered Grayeyes's motion to dismiss or suspend the appeal.

Grayeyes has now asked to lift the stay and permit discovery so he can investigate his bad faith assertion and gather evidence of Laws's subjective intent in filing this case. Laws objects to the request for a discovery schedule, arguing primarily that the rules of procedure do not permit post-trial discovery for the attorney fee dispute.

The Court does not decide whether discovery is available after trial to investigate a bad faith claim for attorney fees. Instead, having considered Grayeyes's briefing, the Court concludes that there is no basis to award attorney fees in this case.

RULING

I. Attorney fees for Bad Faith are not awarded because Laws's case had merit.

Before awarding attorney fees for bad faith, the Court must find that the action was both "...without merit and not brought or asserted in good faith."[1] If a court determines that an action has merit, it is unnecessary to determine if it was brought in bad faith, since both requirements must be met before fees may be assessed.[2] And for an action to be without merit, the claims must be more than just unsuccessful — they must be so deficient that the party could not have reasonably believed the claims to have a basis in law and fact.[3]

In the Court's assessment, Grayeyes conflates his bad faith and merit arguments. He primarily focuses on Laws's intent, arguing that Laws knew or should have known (1) that his evidence was superficial and would be insufficient to prevail at trial, (2) the defense of laches was insurmountable, and (3) that his belief in his case was based on such thin analytical reasoning that a reasonable person with non-vindictive motives would be skeptical of its propriety. In fact, the 8 ½ pages of Grayeyes's overlength brief devoted to bad faith primarily argue Law's motives and purposes in filing suit. But Laws's purpose and motive is not relevant to determining whether his case had merit. And Laws's claims had merit.

First, his claim was based on a reasonable interpretation of the statute. Utah Code § 20A-4-403(1)(a) explicitly authorizes a "registered voter" to contest the result of an election by filing a complaint within 40 days after the canvass. As a registered voter, Laws had standing and his complaint was timely. He also alleged grounds under Section 20A-4-402(1)(g) —that Grayeyes was not a resident of San Juan County, a continuing requirement to be eligible for office.

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[1] Utah Code §78B-5-825.
[2] See *Utah Telecom. Open Infrastructure Agency v. Hogan*, 294 P.3d 645, 651 (Utah Ct.App. 2013).
[3] *Verdi Energy Group, Inc. v. Nelson*, 326 P.3d 104, 115 (Utah Ct.App. 2014).

Second, Laws's claims had a basis in fact. In support of his belief that Grayeyes was not a resident of San Juan County, Laws presented credible supporting evidence. For example, the only real property that Grayeyes owns is a house located in Arizona. Grayeyes dates a woman from Arizona and often stays overnight at her house. Grayeyes has an Arizona driver's license, gets his mail in Arizona, and registers his vehicles in Arizona. Grayeyes does not have a physical house at Navajo Mountain and stays at several different locations. Some people who live at Navajo Mountain do not believe Grayeyes lives there. And some people who visit Navajo Mountain regularly have not seen him during their visits.

The proof Laws presented at trial supported his belief that Grayeyes was not a resident of San Juan County. And although his proof was ultimately outweighed by other, more compelling evidence in the case, it does not diminish the overall merit of his claim. Moreover, the Court's central ruling — that Grayeyes was a resident even though his "residence" was located at multiple locations within the same voting district— appears to be a matter of first impression in Utah and Laws would have had no legal precedent to rely upon to anticipate that outcome before trial.

Grayeyes argues that there are two other, separate grounds for him to recover bad faith fees in this case: (1) he asserts that Utah Code §20A-1-805 permits fees when a bad faith complaint is filed with the Lieutenant Governor, and he argues for the extension of that statute to all election contests; and (2) he asserts that general equitable principles allow for fees when a litigant has acted in bad faith, under *Stewart v. Utah Pub. Serv. Comm'n.*[4]

Utah Code §20A-1-805 allows for attorney fees when a petition alleging an election code violation is filed with the Lieutenant Governor, if the petition was filed in bad faith. But importantly, the plain language of the statute specifically limits the recovery of fees to actions brought under Part 8 of Chapter 1, and even provides a unique definition of bad faith in § 802(1). The Court believes those provision are intentionally limiting. And there is no indication that the Legislature intended the provision to extend to non-governmental actors under Chapter 4, Part 4 of the Election

[4] *Stewart v. Utah Pub. Serv. Comm'n.*, 885 P.2d 759, 782 (Utah 1994).

Code. If the Legislature wanted to extend that same definition of bad faith to Chapter 4, it would have explicitly included that language in the statute.

Finally, Grayeyes asserts that a Court has a general equitable authority to award fees when a litigant acts "...in bad faith, vexatiously, wantonly, or for oppressive reasons."[5] Importantly, the quoted phrase is not the decision of the *Stewart* case. Instead, it is simply a restatement from Moore's Federal Practice (2d ed. 1972), cited by the *Stewart* court to support its decision to award attorney fees under the substantial benefit doctrine (discussed below). The Court does not find a general statement about inherent equitable power to be persuasive when considering bad faith. Instead, the Court concludes that the only basis for recovery of bad faith attorney fees in this case is under the bad faith statute. And since Grayeyes does not meet the requirements for recovery under the statute, his request for bad faith attorney fees must be denied.

II. The Private Attorney General Doctrine has been disavowed by the Legislature.

Grayeyes next argues that he should be awarded attorney fees under the private attorney general doctrine. He recognizes that the Legislature has explicitly disallowed that doctrine by statute but argues that the statute is unconstitutional. As explained below, the statute is binding upon the Court.

In 2009, the Legislature enacted Utah Code §78B-5-825.5: "A court may not award attorney fees under the private attorney general doctrine in any action filed after May 12, 2009."

Grayeyes argues that the statute is unconstitutional under the ruling in *Injured Worker's Asssociation of Utah v. State of Utah*, 2016 UT 21. In that case, the Utah Supreme Court determined that the Labor Commission's mandatory attorney-fee schedule, imposed in worker's compensation cases, was unconstitutional because the fee limits encroached on the Supreme Court's exclusive authority to govern and regulate the practice of law. In short, the amount of an attorney's fee is a matter of negotiation between an attorney and her client, constrained by the rules of professional conduct and

[5] See *Stewart* at 782; *Respondent's Application for Costs and Fees*, pg.14 ¶ 1.

measured by reasonableness. And only the Utah Supreme Court — not the Legislature — may regulate those fees.

Grayeyes argues that *Injured Workers Ass'n. of Utah* also prohibits the Legislature from restricting a court's inherent equitable power to award fees "in the interest of justice and equity."[6] He believes that is also an improper regulation of the practice of law. But the Court disagrees with his interpretation of the case. *Injured Workers Ass'n. of Utah* is about the Utah Supreme Court's exclusive authority to regulate attorney fees between attorneys and their clients. But this case is not about restricting fees between Grayeyes and HIS counsel. It concerns Grayeyes's ability to extract attorney fees from an opposing party.

Nevertheless, the issue is raised — may the Legislature, by statute, bar a "doctrine" for attorney fees that has existed under the court's inherent equitable power to award fees "in the interest of justice and equity?"[7] The private attorney general doctrine is one of those. It is a judge-made guideline to help courts exercise their inherent equitable powers. Under the doctrine, fees have been awarded when a case vindicated a strong or societally important public policy and the cost of doing so outweighed a party's own pecuniary interest.[8]

The Court does not believe that the Legislature has constrained the court's equitable authority simply by disallowing fees under the private attorney general doctrine. The umbrella considerations of "justice and equity" are not limited by removing the subset of private attorney general considerations.

And the Court finds that this case does not warrant attorney fees in the interest of justice and equity. It is apparent to the Court that Grayeyes believes his election is significant for Native Americans because there is now a Navajo majority on the San Juan County Commission. And history may confirm his view. But while the Court is certainly aware of the historical tension in San Juan County between Native American citizens and others in the County, those considerations were not part of the Court's analysis at trial and this is not a civil rights case.

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[6] See *Rehn v. Christensen*, 392 P.3d 872, 880 (Utah Ct.App. 2017).
[7] See *Rehn v. Christensen*, 392 P.3d 872, 880 (Utah Ct.App. 2017).
[8] See *Stewart* at 783.

Instead, this case is specific to one person and his qualification for office based on his residency. Evidence about his cultural background was marginally relevant to the question of residency. But the Court's analysis would have been the same if he had simply lived at the division of voting districts, rather than the division of Utah and Arizona. This was a straightforward election challenge authorized by statute. And if the Legislature intended for attorney fees to be awarded in this type of case, it would have explicitly said so.

III. The Substantial Benefit Doctrine does not apply in this case.

Grayeyes also contends that, by fighting for his seat on the County Commission in this litigation, he was acting in a representative capacity for three separate classes of voters: (1) all Native Americans in San Juan County; (2) the Navajo people within his voting district; and (3) all voters in San Juan County who participated in the election. Thus, by prevailing and retaining his elected position, the litigation conferred a substantial benefit upon the members of those groups, entitling him to attorney fees. Those benefits include preventing discrimination and voter suppression against Native Americans, giving every voter a voice, and vindicating the candidate chosen by a majority of voters.

The Court may award attorney fees under the substantial benefit doctrine if a litigant, proceeding in a representative capacity, obtains a decision that confers a substantial benefit upon members of an ascertainable class or group.[9] In *LeVanger*, for example, a member of a homeowner's association sued the association for improperly amending the covenants, restrictions, and conditions of the association. The litigation provided a substantial benefit because it enforced the same rights of all shareholders in the homeowner's association.[10] Similarly, in *Stewart*, certain telephone users challenged a Utah Public Service Commission order that affected the rates charged by a public

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[9] *LeVanger v. Highland Estates Properties Owners Ass'n, Inc.*, 80 P.3d 569, 575 (Utah Ct.App. 2003).
[10] Id at 577.

utility.[11] Plaintiffs' action benefitted all telephone users by enforcing better rates and they would not have received the benefit, but for the action of the representative users.

The commonality among substantial benefit fee cases is that a representative of a group participates in the litigation as if all other members of the group were parties to the same case. In other words, any member of the group could be substituted for the litigant and they would benefit the exact same way. By awarding fees to one, it limits the overall fees, because similarly-situated litigants could have filed the same lawsuit and obtained the same outcome.

In support of his argument for fees, Grayeyes includes many pages of footnotes and attachments that detail some of the history of Native American disenfranchisement in San Juan County. Given that history, he believes his confirmed membership on the County Commission provides a substantial benefit because, (1) he can give Native Americans a better voice; (2) it encourages Native Americans living in Utah, but traveling for work in other states, to run for political office; and (3) it ensured that the voters in his voting district are represented by their elected candidate.

In evaluating those claimed benefits, the Court must determine whether Grayeyes was a representative of a class and whether that class received a substantial benefit from the litigation. And the Court concludes that neither factor is met.

First, Grayeyes is not a representative of an ascertainable group because there are no similarly-situated defendants that would benefit from this litigation. This case turns on the fact-specific inquiry into whether Grayeyes is a resident of San Juan County. His home, his property ownership, his living habits, his out-of-state contacts, his travel practices, and his experiences are all unique to him and are the critical factors in determining his residency. There is no similarly-situated person. And the determination that he is a resident is not transferable to the next political candidate whose residency is challenged. Moreover, only Grayeyes was elected by a majority of voters in his voting district. And only he gets to be the Commissioner by having his election confirmed. This is not like a homeowner association, corporate proxy suit, or election irregularity that affected a group of people in the same way.

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[11] *Stewart v. Utah Pub. Serv. Comm'n.*, 885 P.2d 759, 782 (Utah 1994).

Second, it remains to be seen if Grayeyes's position on the County Commission will benefit the groups he identifies. Perhaps he'll be a remarkable commissioner who unites opposing factions in the community for the betterment of all. Or maybe he'll be a terrible commissioner who polarizes and disenfranchises his constituents. Presumably, every candidate for public office believes their tenure will benefit their voters.

But the benefits Grayeyes claims are not the type of benefit contemplated by the substantial benefit doctrine. The doctrine requires that the benefit be obviously quantifiable and that the group benefit the same way. And the Court cannot confirm all of Grayeyes's constituents as County Commissioners at the conclusion of this case.

IV. Grayeyes has not incurred recoverable costs.

Taxable costs are "...those fees which are required to be paid to the court and to witnesses, and for which the statutes authorize to be included in the judgment."[12] Other expenses of litigation, though necessary, are not taxable as costs.[13]

Grayeyes has requested $17,069.49 as costs in this case.[14] Consistent with *Frampton,* the Court has carefully reviewed the memorandum of costs and concludes that the majority of claimed expenses are litigation expenses and are not recoverable as costs. Lunches, hotels, vehicle rentals, online research, and transcription for trial preparation fall within that category. Similarly, the $8,500 claimed for paralegal and law clerk services are something between trial preparation expenses and attorney fees — necessary for trial but not recoverable.

Grayeyes's only expense entry that is potentially taxable as costs is the "Witness Fees and Travel" amount of $2,458.77. Grayeyes has not provided any itemization for those expeneses. Additionally, Grayeyes did not file any subpoenas in the case indicating that those fees were actually paid pursuant to subpoena.

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[12] *Frampton v. Wilson,* 605 P.2d 771, 774 (Utah 1980).
[13] *Id.*
[14] See pp. 5-6 of the billing records attached to the Declaration of Steven C. Boos, included with *Respondent's Application for Costs and Fees.*

Witness fees may be taxed as costs in the amount permitted by statute.[15] Under Rule 45(b)(2) U.R.C.P., a party serving a subpoena must tender the witness fee for one day's attendance and the mileage allowed by law. Currently, the daily fee for a witness is $18.50 plus $1 for each four miles in excess of 50 miles actually and necessarily traveled in going only.[16]

Because Grayeyes has failed to provide sufficient proof supporting his claim for witness fees and travel, and the amount demanded far exceeds the highest possible amount that might be awarded in this case, the Court denies those fees as taxable costs.

ORDER

Because there is no statutory or equitable basis to award attorney fees and there is insufficient proof of any taxable costs, Respondent's application for attorney fees and costs is denied.

Dated: 6/20/19

By: Don Torgerson
Don M. Torgerson
District Court Judge

STATE OF UTAH
SEVENTH DISTRICT COURT

[15] *Young v. State*, 16 P.3d 549, 554 (Utah 2000).
[16] Utah Code §78B-1-119(1).

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 180700016 by the method and on the date specified.

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06/21/2019 /s/ CHAY DAVIS

Date: _____ _____

Deputy Court Clerk