

IN THE SUPREME COURT OF THE STATE OF NEVADA

CRAIG A. MUELLER,
Petitioner,

vs.

THE FIRST JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CARSON CITY; AND THE
HONORABLE JAMES E. WILSON,
DISTRICT JUDGE,

Respondents,

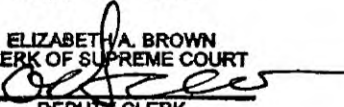
and,

JOSEPH LOMBARDO,
Real Party in Interest.

No. 86064

FILED

AUG 17 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER DENYING PETITION

This original petition for a writ of mandamus challenges a district court order awarding attorney fees as a sanction under NRS 7.085.

FACTS AND PROCEDURAL HISTORY

Attorney Joey Gilbert ran against real party in interest, Governor Joseph Lombardo, in the 2022 republican gubernatorial primary election. The initial election results showed that, out of the 15 republican primary candidates, Gilbert and Governor Lombardo were the top two vote-getters, with Gilbert receiving roughly 27 percent of the votes (61,738 votes out of 228,570 total votes), and Governor Lombardo receiving roughly 38 percent of the votes (87,761 votes out of 228,570 total votes).¹ Gilbert requested a recount, which roughly confirmed this margin of victory.

¹These results are part of the record, and we also take judicial notice of their veracity on the Nevada Secretary of State's website. See <https://www.nvsos.gov/SOSelectionPages/results/2022StateWidePrimary/ElectionSummary.aspx>; see also NRS 47.130(2)(b) (authorizing courts to

Gilbert then initiated an election contest under NRS 293.407-.410. Petitioner Craig A. Mueller represented Gilbert in that action. The statement of contest that Mueller filed on Gilbert's behalf alleged that Governor Lombardo did not actually win the primary election. For support, Mueller relied on a report prepared by Edward Solomon (the Solomon Report), which, according to the statement of contest, opined that the election results were "mathematically impossible" and that they were the result of a "predetermined plan or algorithm." In layman's terms, that predetermined algorithm allegedly counted certain mail-in votes for Gilbert and other primary candidates as votes for Governor Lombardo. Based on the Solomon Report, the statement of contest further alleged that when counted correctly—a mathematical process that Solomon, Gilbert, and Mueller refer to as "restoration"—Gilbert won the primary election by more than 50,000 votes. The statement of contest alleged that this improper counting was the product of "illicit mathematics." As for how the "predetermined algorithm" and "illicit mathematics" operated, the statement of contest offered no theories, stating that it "does not allege who caused this to happen, when it happened, or how it happened---only that i[t] HAS HAPPENED."

The record reflects that Mueller did not list Solomon as an expert witness and that he refused to make Solomon available for a deposition. Instead, Mueller retained three other witnesses to vouch for the Solomon Report's veracity. Those three witnesses, Drs. Daughterity, Allen, and Hemmers, submitted reports that were filed with the statement of

take judicial notice of facts that are "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

contest. None of those experts attempted to replicate Solomon's restoration analysis. In a deposition, Dr. Daugherty testified that his report contained mathematical errors and that he believed the Solomon Report's fundamental premise was "not relevant." Similarly, during Dr. Allen's deposition, he recalled stating in an email that the math behind the restoration process "works like crazy" but then admitted that he did not know how or why the math worked and that he had "no idea" what the correct vote count was. And during Dr. Hemmers' deposition, he admitted that he simply copy-pasted large portions of the Solomon Report into his own report.

Governor Lombardo moved for summary judgment, asserting that Gilbert and Mueller had failed to produce admissible evidence that the alleged "predetermined algorithm" and "illicit mathematics" had caused Governor Lombardo to win the republican primary over Gilbert. In opposition, Gilbert and Mueller changed course, arguing that even if they had no evidence in that respect, restoration was simply one of several "remedies" that they were seeking. The district court held a hearing at which it orally granted Governor Lombardo's motion. In doing so, the district court attempted to clarify the relevance of "restoration," stating:

I'm relying upon the fact that I don't have any information, if all of the math [in the Solomon Report] is correct, that there's a difference in voting of 1 or 1,000 or 10,000 or any other number . . . and the statute [NRS 293.410], the way that I am reading it, indicates that that is necessary information.

Thereafter, the district court entered a written order granting Governor Lombardo's summary judgment motion, expressly finding that none of Gilbert and Mueller's three expert witnesses provided any opinions—admissible or otherwise—on the process of "restoring" the vote count.

Governor Lombardo then filed a motion for attorney fees against Gilbert and Mueller under NRS 18.010(2)(b) and NRS 7.085, respectively. In opposition, Mueller contended that an award against him under NRS 7.085 was unwarranted because he cited the correct statute for an election contest (NRS 293.410) when he filed the statement of contest. Mueller also contended that he filed the statement in good faith given that he retained the three experts before doing so. Mueller acknowledged, however, that when he filed the statement, his experts “had not . . . conducted a restoration” analysis but had simply “opined that Lombardo mail-in votes were artificially contrived.” The opposition also stated that when the statement of contest was filed “it was believed by [Gilbert] and [Mueller] that a restoration would shift a significant number of votes to Gilbert and change the outcome of the election.” The district court granted Governor Lombardo’s motion and awarded roughly \$161,000 in attorney fees against Gilbert and Mueller. In doing so, the district court found that

Mr. Gilbert did not—and could not—present any admissible evidence to support the case-dependent thesis that the restored election results show he received the most votes in the 2022 Primary. . . . Mr. Gilbert’s failure to adduce any competent evidence regarding the key element of “restoration” is grounds for the imposition of sanctions under NRS 18.010(2)(b) and NRS 7.085(1) as he could never demonstrate that he prevailed in the 2022 Primary.

Mueller now brings this writ petition to challenge the award against him.²

²Gilbert has not challenged the order. Although Mueller filed a notice of appeal from the attorney fees award on Gilbert’s behalf, this court granted Gilbert’s motion to dismiss that appeal as to him because he had

DISCUSSION

Because Mueller was not a party to the underlying action and therefore lacked standing to appeal the district court's attorney-fee award, Mueller lacks a plain, speedy, and adequate legal remedy such that he is entitled to seek relief through an original proceeding in this court. *See Watson Rounds v. Eighth Judicial Dist. Court*, 131 Nev. 783, 786-87, 358 P.3d 228, 231 (2015). We “review[] sanctions awarding attorney fees for an abuse of discretion” and the interpretation of statutes de novo. *Id.* at 787, 358 P.3d at 231.

As indicated, the district court awarded attorney fees against Mueller under NRS 7.085(1), which authorizes such an award when an attorney has “[f]iled, maintained or defended a civil action . . . and such action . . . is not well-grounded in fact” or the attorney has “[u]nreasonably and vexatiously extended a civil action.” Mueller contends that his conduct did not satisfy this standard because the statement of contest was accompanied by the three experts’ reports wherein they opined that the official vote count was mathematically impossible. However, as the district court found, the premise behind the election contest was that a “restoration” of the vote count would show that Gilbert received roughly 50,000 more votes than Governor Lombardo, even though none of the three experts could replicate the Solomon Report’s restoration calculations, either when the statement of contest was filed or thereafter. Notably, Mueller has not and does not dispute these findings, even in his writ petition. And given that the statement of contest alleged the vote count was off by roughly 75,000 votes out of 228,570 total votes, the district court was well within its

not authorized Mueller to file the appeal on his behalf. *See Gilbert v. Lombardo*, Docket No. 85556 (Order, Dec. 22, 2022).

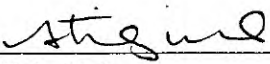
discretion in finding that it was not well-grounded in fact when the statement admitted that Gilbert and Mueller did not know how the supposed “illicit mathematics” and “predetermined algorithm” caused this monumental distortion in the vote count.

Mueller alternatively contends that the district court misconstrued NRS 293.410 as requiring evidence of “restoration.” Admittedly, NRS 293.410 does not use the term “restoration.” But it is evident from the record that the district court used that term synonymously with the statutory language “change[d] the result of the election” and that had the statement of contest not been premised on the concept of “restoration” and used that term, the district court would not have used that term in its orders. To this end, in granting Governor Lombardo’s motion for summary judgment, the district court made its stance as clear as possible that it was not basing its decision on “restoration” but that it was “relying upon the fact that [the court did not] have any information, if all of the math [in the Solomon Report] is correct, that there’s a difference in voting of 1 or 1,000 or 10,000 or any other number.” *See Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 635, 643 n.1, 289 P.3d 201, 206 (2012) (recognizing that a district court’s oral findings may be used to supplement findings that are absent from a written order).

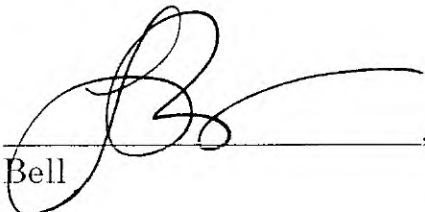
Finally, Mueller contends that sanctions were unwarranted because the district court observed in its order awarding attorney fees that the case “presented unique issues of statewide importance related to the 2022 Republican Gubernatorial Primary Election.” Mueller construes this observation to mean that because the statement of contest raised a novel issue—“illicit mathematics” and a “predetermined algorithm” that allegedly affected the outcome of the election—sanctions were not warranted. *Cf.*

Patush v. Las Vegas Bistro, LLC, 135 Nev. 353, 356-57, 449 P.3d 467, 470 (2019) (observing that sanctions are not warranted when “the underlying claim rested on novel and arguable issues, even if those issues were not resolved in the claimant’s favor”). We disagree and conclude that the district court was well within its discretion in imposing sanctions. Simply because a claim raises an issue of first impression does not necessarily mean that the issue is a legitimate issue of first impression. *See id.* (recognizing that sanctions may be unwarranted if a claim raises a “legitimate issue of first impression”). Sometimes, as is the case here, the issue is novel because it is so lacking in arguable merit that no previous litigant has raised it. An election contest alleging that an election was affected by “a predetermined algorithm” and “illicit mathematics,” with no legitimate explanation for how that occurred, much less evidence to support those allegations, falls far short of being “legitimate.” In light of the foregoing, we

ORDER the petition DENIED.


Stiglich, C.J.


Lee, J.


Bell, J.

cc: Hon. James E. Wilson, District Judge
Mueller & Associates
Campbell & Williams
Carson City Clerk