

APR 20 2009

STATE OF MINNESOTA  
IN SUPREME COURT

FILED

In the Matter of the contest of  
General Election held on  
November 4, 2008, for the purpose of  
electing a United  
States Senator from the State of  
Minnesota,

STATEMENT OF THE CASE OF  
APPELLANTS

Trial Court File No.: 62-CV-09-56

Norm Coleman and Cullen Sheehan,

Supreme Court Case No.: *A09-697*

*Appellants,*

v.

Al Franken,

*Respondent.*

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**1. COURT OF CASE ORIGINATION AND NAME OF PRESIDING JUDGE**

Ramsey County District Court  
District Court Judges Elizabeth A. Hayden, Kurt J. Marben, and Denise D. Reilly

**2. JURISDICTIONAL STATEMENT**

Statute and Rule Authorizing Appeal: Minn. Stat. § 209.10, subd. 4; Minn. R. Civ. App. P. 103.03(a).

Date of Entry of Judgment from Which Appeal is Taken: April 14, 2009.

Authority Fixing Time Limit for Filing Notice of Appeal: Minn. Stat. § 209.10, subd. 4.

The judgment to be reviewed disposes of all claims by and against all parties.

**3. TYPE OF LITIGATION AND STATUTE AT ISSUE**

Type of Litigation: Election Contest.

Statutes At Issue: Minn. Stat. § 209.12; Minnesota Statutes Chapter 203B; Minn. Stat. § 209.06.

**4. DESCRIPTION OF CLAIMS, DEFENSES, ISSUES LITIGATED AND RESULT BELOW**

On November 4, 2008, the general election held in the State of Minnesota included the election for the office of United States Senator. On the evening of the election, the vote tally showed 1,211,590 votes cast for Norm Coleman and 1,211,375 votes cast for Al Franken, an advantage of 215 votes for Coleman. On November 18, 2008, the Minnesota State Canvassing Board (“MSCB”) directed the Office of the Minnesota Secretary of State to oversee an administrative manual recount of votes cast for the office of United States Senator pursuant to Minn. Stat. § 204C.35, Subd. 1. On January 5, 2009, the MSCB certified the recount results: Coleman received 1,212,206 votes and Franken 1,212,431, a difference of 225 in favor of Franken and the closest U.S. Senate race in Minnesota’s history.

Appellants initiated this contest proceeding under Minn. Stat. § 209.12 seeking a determination that Coleman in fact received the highest number of legally cast votes. The trial focused primarily on absentee ballots, including an equal protection claim based on the disparate treatment of similarly situated ballots and a due process claim based on the imposition of a standard different than that applied by officials during the election, but also addressed alleged double-counting of ballots in certain Minneapolis precincts during the recount and whether ballots that cannot be found in another Minneapolis precinct should be included in the final tally of legally cast votes.

During the seven-week long trial, Coleman presented evidence through election officials and individual voters that thousands of rejected absentee ballots had sufficient

indicia of trustworthiness to substantially comply with the statutory standard (Minn. Stat. § 203B.12) and, consistent with the goal of Minnesota law and legal precedents to enfranchise voters, should be counted. He also presented evidence of substantial disparities among election officials in how they applied the statutory standard. Indeed, the testimony of numerous elections officials demonstrated that whether an absentee ballot was accepted depended on where the voter lived. And the disparity in applying the standard affected not just a few ballots but thousands.

Midway through trial, the court adopted a strict compliance application of the statutory standard under Minn. Stat. §§ 203B.12 and 203B.24, which was different from, and more exacting than, that used on election day by the State's counties and cities for determining whether to accept an absentee ballot as a legally cast vote.<sup>1</sup>

Thereafter, the court made its view clear that any disparate treatment of ballots on election day was irrelevant. It thereafter refused to admit evidence of how local officials judged absentee ballots on election day, as well as evidence of absentee ballots cast on election day that failed to meet the court's strict compliance standard and therefore, were illegal votes. The court granted Franken's motion in limine to exclude Coleman's expert statistician as well. Coleman ultimately compiled this evidence in extensive written

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<sup>1</sup> The court's mid-trial rulings also imposed on the parties the burden to prove not only that the reason election officials rejected a particular ballot was in fact incorrect but that each ballot met every other statutory and regulatory requirement as well. Moreover, the trial court declined to apply any of the presumptions regarding those requirements that the evidence demonstrated were routinely applied by the counties and cities on election day. The court instead insisted on direct, uncontradicted evidence of compliance, evidence sometimes not available from the Statewide Voter Registration System which was still not accurate or complete at trial's end.

offers of proof. The court also denied Coleman's motions seeking, as a matter of Minnesota law and to satisfy the equal protection and due process guarantees of the federal Constitution, to have the court apply one, uniform standard to all absentee ballots cast in the November 4, 2008 election. The court also denied Contestants' petitions (and motion) seeking an inspection of precincts in which double-counting allegedly occurred during the recount, despite the statutory provision for inspections under Minn. Stat. § 209.06.

After the close of trial, the court ruled that only 351 of the approximately 11,000 previously rejected absentee ballots were in fact legally cast votes and should be added to the recount tallies. It also ruled that Coleman had failed to establish that double-counting of votes had occurred during the recount and that the decision of the MSCB to accept the election night tally from Minneapolis precinct 3-1 was entitled to deference and that tally should be included in the certified count. It then declared Franken had received the highest number of legally cast votes and was therefore entitled to receive the election certificate.

## **5. ISSUES PRESENTED ON APPEAL**

I. Whether the trial court erred in excluding evidence regarding (a) the disparate application by election officials of the statutory standard governing absentee ballots and (b) the presence of illegal votes in the certified totals from election night?

II. Whether the trial court violated the constitutional protections of equal protection and due process when it declared that Respondent received the highest number of "legally cast votes" where the record demonstrated that, by the trial court's rulings, the number of "illegally cast" ballots

counted on election day and during the recount greatly exceeded the margin between the candidates and it cannot be determined for which candidate those illegal votes were counted?

III. Whether the trial court violated the constitutional protections of equal protection and due process when it imposed a strict compliance standard for the rejected absentee ballots rather than applying a substantial compliance standard to reflect those actually applied by election officials (as well as this Court's longstanding policy favoring enfranchisement)?

IV. Whether the trial court erred in declining to order inspections of precincts in which double-counting was alleged to have occurred?

V. Whether the trial court erred in ruling that missing ballots from Minneapolis Precinct 3-1 were properly included in the tally of legally cast votes?

**6. RELATED APPEALS**

None.

**7. CONTENTS OF RECORD**

A full transcript of all proceedings before the Contest Court is necessary to review the issues on appeal. That transcript has already been delivered to the parties and the Contest Court but has not yet been filed with the trial court administrator. Appellants will request that the transcript be filed with the trial court administrator.

**8. ORAL ARGUMENT**

Oral argument is requested at the location provided in Rule 134.09, subd. 2.

**9. TYPE OF BRIEF**

A formal brief under Rule 128.02 will be filed.

**10. NAMES, ADDRESSES, ZIP CODES AND TELEPHONE NUMBERS OF ATTORNEYS FOR APPELLANT AND RESPONDENT**

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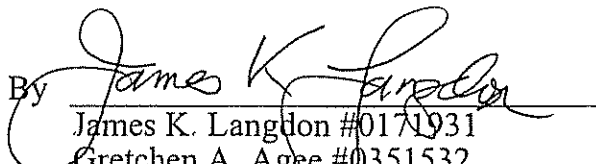
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Respectfully submitted,

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