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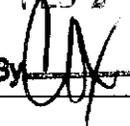
STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

FEB 26 2009

SECOND JUDICIAL DISTRICT

By  Deputy

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

District Court File No. 62-CV-09-56

Cullen Sheehan and Norm Coleman,

Contestants,

vs.

Al Franken,

Contestee,

Dennis Peterson, et. al.,

Petitioners,

Supreme Court File No. A09-65

vs.

Mark Ritchie, Minnesota Secretary of State, et. al.,

Respondents.

**PETITIONERS' MEMORANDUM OF LAW OPPOSING CONTESTANTS'
RULE 60.02 MOTION TO VACATE JUDGMENT**

On January 22, 2009, Norm Coleman, Intervenor-Respondent in the above-captioned
Petition filed with the Minnesota Supreme Court, filed a response to Petitioners' motion for
summary judgment stating that he agreed that Petitioners' absentee ballots should be counted.
Contestants' Memorandum of Law in Response to Petitioners' Motion for Summary Judgment,
January 22, 2009, at 1. Now, in an extraordinary reversal, Coleman asks this Court to vacate its

February 10, 2009, Order granting summary judgment in favor of 24 petitioners. Coleman's motion is based upon a selective review of the evidence, a desperate attempt to find inconsistencies where none exist, and unfounded speculation.

I. ARGUMENT

A. **Coleman is not Entitled to Relief from the February 10 Order as it Relates to the Eight Ballots Identified in Contestants' Memorandum of Law**

Coleman asserts that he is entitled to relief from this Court's February 10 Order because eight ballots which were ordered to be opened and counted allegedly "cannot be squared with the Court's subsequent ruling on February 13, 2009...." Contestants' Memorandum at 3. In order to obtain relief from a judgment, a party must demonstrate: (1) a reasonable case on the merits; (2) reasonable excuse for failure to act; (3) the moving party acted with due diligence after notice of entry of judgment; and (4) no substantial prejudice will result to the opposing party if the motion is granted. Reid v. Strodman, 631 N.W.2d 414, 419 (citing Finden v. Klass, 128 N.W.2d 748, 750 (Minn. 1964)).

1. Coleman does not demonstrate a reasonable claim on the merits.

Coleman has failed to establish that he has a reasonable claim on the merits with respect to five of the eight ballots identified in his memorandum because they are consistent with the Court's February 13 Order¹:

Thomas and Leona Quinlan

Coleman alleges that the absentee ballots cast by Thomas and Leona Quinlan are inconsistent with the Court's February 13 Order because each signed the other's absentee ballot return envelope. Contestants' Memorandum at 2. As explained in the materials supporting

¹ In Petitioners' Renewed Motion for Summary Judgment filed February 20, 2009, Petitioners called the ballots cast by Hannah Gorski, Kim Falde, and Charles Quinn to the Court's attention for such action as the Court deems just and proper. See page 5-6, *infra* for details.

Petitioners' motion for summary judgment, when Mr. and Mrs. Quinlan voted by absentee ballot in-person at the Northern Dakota County Government Center, the local election official provided each with the other's absentee ballot return envelope. *See* Memorandum of Law in Support of Petitioners' Motion for Summary Judgment ("Petitioners' Summary Judgment Memorandum") at 11-12; Affidavit of Charles N. Nauen (dated January 21, 2009) in Support of Petitioners' Motion for Summary Judgment ("Nauen Aff.") Ex. 18, Ex. 19. Mr. and Mrs. Quinlan signed the envelopes they were provided and returned them to the local election official who also served as their witness. Id.

The eligibility certificates were completed, matched the information on the absentee ballot applications, and were signed by the voters. Id. Mr. and Mrs. Quinlan complied with all requirements which are mandatory and personal to the voter and any technical non-compliance in signing each other's envelope was the result of official error in providing the wrong envelopes and not the fault of Mr. and Mrs. Quinlan. There is no inconsistency between the February 13 Order and the Court's Order granting summary judgment in favor of Mr. and Mrs. Quinlan.

Greg McCool

Coleman alleges that the absentee ballot cast by Greg McCool is inconsistent with the Court's February 13 Order because the name on his certification is different than the name on his absentee ballot application. Contestants' Memorandum at 2. The discrepancy between the information provided on Mr. McCool's absentee ballot application and his eligibility certificate was due to a clerical error misspelling his name as "Greg Mc Curl" on the label affixed to his return envelope. *See* Petitioners' Summary Judgment Memorandum at 19; Nauen Aff. Ex. 34. Mr. McCool complied with all requirements which are mandatory and personal to him and the technical non-compliance was the result of official error. There is no inconsistency between the February 13 Order and the Court's Order granting summary judgment in favor of Mr. McCool.

Audrey Verlo

Coleman alleges that the absentee ballot cast by Audrey Verlo is inconsistent with the Court's February 13 Order because "her address does not match that at which she was registered and was sent new registration materials....." Contestants' Memorandum at 2. The Court's February 13 Order provides that an absentee ballot is not legally cast where the voter is not registered in the precinct in which he or she seeks to cast an absentee ballot. Order, February 13, 2009. Contrary to Coleman's assertion, neither the Order nor Minnesota law requires the address on an absentee ballot application and eligibility certificate to match the address at which the voter is registered. The evidence submitted by Petitioners establishes that Ms. Verlo was registered to vote in the precinct in which she cast her absentee ballot. *See* Petitioners' Summary Judgment Memorandum at 21; *Nauen Aff. Ex. 39*. There is no inconsistency between the February 13, 2009 Order and the Court's Order granting summary judgment in favor of Ms. Verlo.

Donna Mortenson

Coleman alleges that the absentee ballot cast by Donna Mortenson is inconsistent with the Court's February 13 Order because (1) the address on her certification does not match the address she says was on her absentee ballot application; (2) her certification is not dated; (3) her witness did not date her signature; (4) and she is not registered at the address on the ballot envelope. Contestants' Memorandum at 2. These alleged inconsistencies evaporate upon review of the record and the Court's February 13 Order.

First, the address on Ms. Mortenson's absentee ballot application matches the address on her eligibility certificate as required by Minnesota law and this Court. *See Nauen Aff. Ex. 47-A and 47-D*. The discrepancy between the address on her absentee ballot application and Ms. Mortenson's declaration is the result of transposing the numbers in her street address; 507 5th

Street is listed on Ms. Mortenson's absentee ballot application and 705 5th Street is listed in Ms. Mortenson's declaration (this same error appears to have occurred in the Secretary of State's voter registration records). *See* Nauen Aff. Ex. 47. This discrepancy is due to an innocent mistake and, in any event, does not create an inconsistency with the Court's February 13 Order.

Second, neither Minnesota law nor the Court's February 13 Order requires the voter or the witness to provide a date with the signatures on the absentee ballot return envelopes. The fact that the signatures were not dated does not establish an inconsistency with the Court's February 13 Order.

Finally, Ms. Mortenson is registered to vote in the precinct in which she cast her absentee ballot as required by Minnesota law and this Court's Order. *See* Nauen Aff. Ex. 47; Affidavit of David J. Zoll in Support of Petitioners Motion for Summary Judgment Ex. 47-E. There is no inconsistency between the Court's February 13 Order and the Court's Order granting summary judgment in favor of Ms. Mortenson.

Hannah Gorski

As explained in Hannah Gorski's Supplemental Affidavit and Petitioners' renewed motion for summary judgment, Ms. Gorski was unable to sign her absentee ballot application because she was attending college in St. Augustine, Florida. *See* Memorandum of Law in Support of Petitioners' Renewed Motion for Summary Judgment at 14-16; Affidavit of Charles N. Nauen (dated February 20, 2009) in Support of Petitioners' Renewed Motion for Summary Judgment Ex. 20-A. Accordingly, she instructed and authorized her mother to sign her absentee ballot application on her behalf. *Id.*

Charles Quinn and Kim Falde

As explained in Petitioners' summary judgment materials, Mr. Quinn and Ms Falde voted in person at the Apple Valley City Hall, followed the instructions of the city election official who

provided their ballots, and had their absentee ballots witnessed by the city election official. *See* Petitioners' Summary Judgment Memorandum at 8-9, 12; Nauen Aff. Ex. 12, Ex. 19. Neither Mr. Quinn nor Ms. Falde signed the certificate of eligibility printed on their absentee ballot return envelopes. *Id.* However, both Mr. Quinn and Ms. Falde relied upon the city election official who witnesses their ballots to call any errors or omissions to their attention. *Id.*; see also, Minn. R. 8210.2200, subp. 2.

2. Coleman does not have a reasonable excuse for his failure to act.

Further, without saying so directly, Coleman apparently claims that he has "a reasonable excuse for the failure to act" with respect to the eight ballots because the February 13 Order "changed the answer to the only question at issue – whether the 64 Nauen voters' ballots are legally cast." Contestants Memorandum at 3. The premise of Coleman's implied assertion is false. The February 13 Order did not change the law regarding whether an absentee ballot is legally cast or alter this Court's interpretation and application of the law. Instead, the February 13 Order dovetails with the analysis set forth in the Court's February 10 Order stating that a ballot is legally cast where the voter complied with all relevant statutory requirements or that any failure to comply was not due to fault on the part of the voter. Order, February 10, at 10.

3. Petitioners would be prejudiced if Coleman's motion were granted.

Finally, Coleman asserts that there would be no prejudice to Contestee Al Franken if his motion to vacate is granted. *See* Contestants' Memorandum at 3. Franken is not a party to the Petition² and any prejudice, or lack thereof, to Franken is irrelevant. Rather, the issue is whether Petitioners would be prejudiced by granting Coleman's motion to vacate the February 10 Order.

² Franken was allowed to intervene in the Petition for the limited purpose of opposing Coleman's Motion for Class Certification. *See* Order, February 23, 2009 at 3.

Petitioners have gone to extraordinary lengths to have their absentee ballots counted. They filed an unprecedented petition with the Minnesota Supreme Court, made an unopposed motion for summary judgment, and presented individualized evidence establishing that each of their ballots was legally cast. Vacating this Court's February 10 Order would saddle Petitioners with the additional burden of appearing in court even though they have presented all of the evidence necessary to prove that their ballots were legally cast.

Coleman has failed to meet his burden of establishing that the February 10 Order should be vacated as it relates to the ballots identified in his memorandum of law.

B. There is no Basis for Vacating the Entire February 10 Order.

Notwithstanding his initial support of Petitioners' motion for summary judgment, Coleman asserts that he is entitled to relief from this Court's February 10 Order because he has changed his mind and now believes that "the ability to cross examine the affiants or absentee voters has become critical." This is not a sufficient basis for vacating a judgment.

First, Coleman has not established that he has a reasonable case on the merits. Coleman makes only vague and speculative allusions to problems and inconsistencies in the evidence submitted by Petitioners in support of their motion for summary judgment. He does not offer any evidence that vacating the entire February 10 Order and requiring Petitioners to appear in court would warrant reversal of the Court's decision to open and count Petitioners' ballots. The blind hope that cross-examination of Petitioners will reveal new facts is not sufficient to establish a reasonable case on the merits. *See Beshar v. Weinzapfel*, 474 F.2d 127, 132 (7th Cir. 1973) (party moving for relief from judgment must show facts which, if established, would establish a defense).

Second, Coleman has not attempted to establish a reasonable basis for his failure to raise his opposition while Petitioners' motion for summary judgment was before the Court. The facts

with respect to each Petitioner's ballot were set forth in Petitioners' motion for summary judgment. Coleman expressed his support for Petitioners' motion and elected not to present any evidence that the ballots were not legally cast. Only now, after the Court ordered that the ballots cast by 24 petitioners shall be opened and counted, and in doing so announced its intention to strictly construe Minnesota law, does Coleman voice any opposition to Petitioners' summary judgment motion.

Finally, as explained above, Coleman has not attempted to show that the Petitioners would not be prejudiced by the granting of his motion. Coleman has failed to meet his burden of establishing that the February 10 Order granting summary judgment in favor of 24 petitioners should be vacated in its entirety.

II. CONCLUSION

Coleman has failed to establish that he is entitled to relief from the Court's February 10 Order granting summary judgment in favor of 24 petitioners. Accordingly, Petitioners request this Court deny Coleman's Rule 60.02 Motion to Vacate.

Date: February 26, 2009

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

By: _____

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SECOND JUDICIAL DISTRICT

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

District Court File No. 62-CV-09-56

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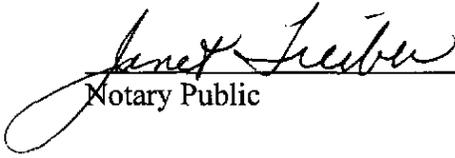
PETITIONERS' AFFIDAVIT OF SERVICE

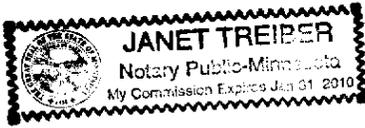
STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

David J. Zoll, being first duly sworn, on oath deposes and states that on the 26th day of February, 2009, he served, by e-mail and U.S. Mail, copies of the attached Petitioners' Memorandum of Law Opposing Contestants' Rule 60.02 Motion To Vacate Judgment upon the parties on the attached list at the addresses therein stated.


David J. Zoll

Subscribed and sworn to before me
this 26th day of February, 2009.


Notary Public



Minnesota Supreme Court File No. A09-0065
and
Ramsey County Court File No. 62-CV-09-56

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Minnesota Supreme Court File No. A09-0065
and
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**Minnesota Supreme Court File No. A09-0065
and
Ramsey County Court File No. 62-CV-09-56**

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