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Court Administrator

MAR 31 2009

STATE OF MINNESOTA  
COUNTY OF RAMSEY

By AK Deputy

DISTRICT COURT  
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

Cullen Sheehan and Norm Coleman,

Contestants,

vs.

Al Franken,

Contestees,

Dennis Peterson, et. al.,

Supreme Court File No. A09-65

Petitioners,

**ORDER GRANTING PETITIONERS'  
SECOND RENEWED MOTION FOR  
SUMMARY JUDGMENT AND  
AMENDING ORDER GRANTING IN  
PART AND DENYING IN PART  
PETITIONERS' RENEWED MOTION  
FOR SUMMARY JUDGMENT  
DATED MARCH 11, 2009**

vs.

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

Respondents.

This matter comes before the Court on Petitioners' Second Renewed Motion for

Summary Judgment. After consideration of the arguments of counsel, the written submission of  
the parties, and the pleadings in the case, IT IS HEREBY ORDERED:

1. Petitioners' Second Renewed Motion for Summary Judgment is granted in full.
2. That portion of the Court's March 11th Order granting summary judgment to Petitioners Donald and Donelda Applebee is vacated.
3. The attached Memorandum is incorporated as if fully set forth herein
4. Any other relief not fully set forth herein is expressly denied.

Dated: March 31, 2009

Elizabeth A. Hayden  
Elizabeth A. Hayden  
Judge, District Court

Kurt J. Marben  
Kurt J. Marben  
Judge, District Court

Denise D. Reilly  
Denise D. Reilly  
Judge, District Court

## MEMORANDUM

### **I. Procedural Posture**

On January 21, 2009, Petitioners filed a motion for summary judgment seeking an order from this panel directing that their absentee ballots be opened and counted immediately and that the total of such votes be declared and certified for use in this election contest or by the United States Senate in any subsequent proceedings. The Court heard argument on this motion on January 30 and issued a ruling on February 10 granting in part and denying in part Petitioners' motion. Petitioners filed a renewed motion for summary judgment on February 20. On March 2, the Court vacated its grant of summary judgment to three Petitioners and held that the factual record before the Court was insufficient. (Order of March 2, 2009 at 5-7.) On March 11, the Court issued an Order granting in part and denying in part Petitioners' renewed motion for summary judgment. That same day, Petitioners filed a renewed motion for summary judgment.

The Court held trial on Petitioners' claims on March 12, 2009. On March 19, Contestants filed an objection to Petitioners' second renewed motion for summary judgment. Contestants did not make any objection to the renewed motion prior to trial on March 12<sup>th</sup>.

### **II. Petitioners' Renewed Motion for Summary Judgment is Granted**

In their second renewed motion for summary judgment, Petitioners seek summary judgment on claims brought by four voters: Katie Kaszyski, Roxanna Saad, Kourteney Dropps, and Tempest Moore. In addition to the evidence presented by Petitioners in support of their motion for summary judgment, the Court in the election contest received evidence as to each of these voters. As in prior orders, the Court looks at the individualized evidence in support of Petitioners' claims that their ballots were properly cast and rejected in error in the November 4, 2008 election. The Court examines each of the identified Petitioners in turn.

Katie Kaszynski

In the Court's February 10<sup>th</sup> Order on Petitioner's Motion for Summary Judgment, the Court declined to grant summary judgment to Petitioner Kaszynski on the sole basis that there was no evidence before the Court that she had not otherwise voted in the election. This was the sole deficiency noted by the Court. (Order of Feb. 10, 2009 at 12.) Such evidence is critical because Minnesota law permits individuals who have cast absentee ballots to supplant their original ballot by casting a later absentee ballot or voting at the polls on election day. Minn. Stat. § 203B.25, subd. 2. Petitioner Kaszynski submitted a revised declaration in support of her renewed motion for summary judgment in which she affirmed that she submitted a voter registration application with her absentee ballot and that she had not otherwise voted in the election. (Nauen Aff. in Supp. of Petitioners' Second Renewed Mot. for Summ. J. (hereinafter "Nauen Aff.") at Ex 1-A.) Neither Respondents nor Intervenor produced any evidence to rebut Petitioner's showing that she had not otherwise voted on election day.<sup>1</sup> In his untimely opposition to Petitioners' current motion, Intervenor argues that the Court should reject Petitioner's Kaszynski's ballot for signature mismatch, improper witnessing or lack of registration but does not object to her revised declaration that she did not otherwise vote in the November 4, 2008 election. Intervenor presents no facts in support of his arguments merely inferences directly contrary to Petitioner's sworn declaration. Accordingly, the Court grants summary judgment to Petitioner Kaszynski and orders that her ballot be forwarded to the Secretary of State for opening and counting.

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<sup>1</sup> "Contestants" filed an opposition to Petitioners' renewed motion for summary judgment. As the Court has repeatedly noted, Contestants in the election contest are not parties to this proceeding under § 203B.44 and, rather, Norm Coleman is an Intervenor in this action. (See Order of March 2, 2009 at 2 n.1.)

Roxanna Saad

In its' February 10<sup>th</sup> Order on Petitioners' Motion for Summary Judgment, the Court held that Petitioner Roxanna Saad had provided sufficient evidence that she had submitted voter-registration materials with her absentee ballot and would order the opening and counting of her absentee ballot if her voter-registration materials were "located and legally valid." (Order of Feb. 10, 2009 at 10.) Petitioner Saad provided a photocopy of her voter registration materials in conjunction with this renewed motion. (Nauen Aff. at Ex. 4.) The Court is unable to determine from this photocopy whether Petitioner Saad's voter-registration materials are complete and legally sufficient. Specifically, the Court is unable to determine whether Petitioner Saad provided the required driver's license number on the voter-registration application. *See* Minn. Stat. § 201.071, subd. 1 (identifying voter's driver's license number as required information on a voter registration application); *see also* Minn. Stat. § 201.061, subd. 1a (recognizing that a voter registration application is incomplete if the auditor is unable to verify the voter's driver's license number, identification number or social security number provided on a voter's registration application). Accordingly, the Court now orders Dakota County to deliver the originals of Petitioner Saad's voter-registration application and her absentee ballot return envelope to the Secretary of State in accordance with the terms of the Court's Order for Delivery of Ballots to the Office of the Minnesota Secretary of State for Review by the Court. The Court shall only order the opening and counting of Petitioner Saad's absentee ballot once it is satisfied that her voter registration form is, in fact, complete and contains the requisite driver's license number.

Kourtney Dropps

In the Court's February 10<sup>th</sup> Order on Petitioner's Motion for Summary Judgment, the Court declined to grant summary judgment to Petitioner Kourtney Dropps on the basis that

there was no evidence before the Court that she had completed an absentee ballot application, that she was registered to vote, that her ballot was properly witnessed or that her absentee ballot was the only ballot she submitted in the November 4, 2008 general election. (Order of Feb. 10, 2009 at 12.) Intervenor did not file any objection to Petitioner Dropps' initial motion for summary judgment or to her current motion. In support of her renewed motion for summary judgment, Petitioner Dropps has provided evidence by way of affidavit that she completed and signed an absentee ballot application, that she was properly registered to vote in Minnesota, that her absentee ballot was properly witnessed and that her absentee ballot was the only ballot she submitted in the November 4, 2008 general election. (Nauen Aff. Ex. 2-A, ¶¶ 3-6). Intervenor has made no objection to Petitioner Dropps' renewed motion for summary judgment. Given this un rebutted evidentiary record, the Court grants summary judgment to Petitioner Dropps and orders that her ballot to be forwarded to the Secretary of State for opening and counting.

Tempest Moore

In the Court's February 10<sup>th</sup> Order on Petitioner's Motion for Summary Judgment, the Court declined to grant summary judgment to Petitioner Tempest Moore on the basis that there was no evidence before the Court that her ballot was properly witnessed or that her absentee ballot was the only ballot she submitted in the November 4, 2008 general election. (Order of Feb. 10, 2009 at 14.) Intervenor did not object to Petitioner Moore's initial motion for summary judgment but interposed an objection to her renewed motion for summary judgment. In this untimely opposition, Intervenor argues that Ms. Moore's absentee ballot return envelope should not be opened nor her ballot counted because it does not comply with the requirements set forth by the Court in its prior Orders.

First, Intervenor objects that the witness failed to check a box for proof of residence on Petitioner Moore's absentee ballot return envelope. However, as a matter of law, no such box was required to be checked because Petitioner Moore was a registered voter as of September 29, 2008 prior to her submission of the absentee ballot return envelope. *Cf.* Minn. R. 8210.0600 subps. 1 & 2 (setting forth different requirements for witnesses for absentee ballots cast by registered voters).

Second, Intervenor objects that Petitioner Moore's witness was not registered to vote at the time she witnessed her absentee ballot. However, the Court notes that Petitioner Moore's witness was a registered voter within the Statewide Voter Registration System at the time she witnessed the absentee ballot. Section 203B.07, subd. 3 permits an absentee ballot to be witnessed by a registered voter. The Court holds that a person may serve as a "registered voter witness" under § 203B.07 if he or she has ever registered to vote in Minnesota. This reading is consistent with other provisions of the Minnesota Statutes that refer to all voters who have ever registered to vote in Minnesota as "registrants" even if such voters need to update their registration records in order to vote. *See, e.g.*, Minn. Stat. § 201.12, subd. 4 (referencing changing a registrant's status to inactive); *see also* Minn. R. 8200.3600. Accordingly, the Court holds that the witnessing of Petitioner Moore's absentee ballot was legally sufficient.

Finally, Intervenor argues that Petitioner Moore's ballot is legally insufficient because of apparent date mismatches. As this Court has already held an absentee ballot is not legally insufficient because of any date mismatch. (*See Order Granting in Part and Denying in Part Contestee's Conditional Motions for Partial Summary Judgment, Feb. 23, 2009 at 9.*) The Court holds that Petitioner Moore's ballot is legally cast and should be opened and counted.

**III. The Grant of Summary Judgment to Petitioners Donald and Donelda Applebee is Vacated**

**a. Petitioner Gorski Failed to Complete an Absentee Ballot Application**

In its March 11th Order, the Court granted summary judgment to Petitioners Donald and Donelda Applebee. (Order of March 11 at 6.) This grant of summary judgment was in error because these two voters failed to update their voter registration records when they moved within their precincts. (*Compare* Nauen Aff. in Supp. of Petitioners' Renewed Mot. for Summ. J. Exs. 6-A with 6-E & Exs. 7-A with 7-D.) Rule 8200.3600 of the Minnesota Administrative Code provides that "[a] person who has previously registered to vote in Minnesota who changes residence must be permitted to vote only after updating the registration by completing a voter registration application using the person's new residence address." Minn. R. 8200.3600. There is no evidence before the Court that the Applebee Petitioners submitted any updated registration materials with their absentee ballots. Accordingly, to ensure consistency in these proceedings and in the election contest, the Court vacates its grant of summary judgment to Petitioners Donald and Donelda Applebee and vacates its order directing their ballots to be delivered for opening and counting.

**IV. Conclusion**

For the reasons set forth above, the Court grants Petitioner's Second Renewed Motion for Summary Judgment. The Court vacates its grant of summary judgment to Petitioners Donald and Donelda Applebee. The Court does not vacate any other portion of its March 11th Order.