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STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF RAMSEY	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 from the State of Minnesota,

ORDER ON CONTESTANTS' MOTION FOR SUMMARY JUDGMENT

Cullen Sheehan and Norm Coleman,

Ct. File No. 62-CV-09-56

Contestants,

vs.

Al Franken,

Contestee.

The above-entitled matter came on for hearing before the Court on January 23, 2009, upon Contestants' Motion for Summary Judgment. Counsel noted their appearances on the record. The Court having heard and read the arguments of counsel, and based upon the files, records, and proceedings herein, makes the following:

ORDER

1. Contestants' Motion for Summary Judgment is DENIED.
2. Any other relief not specifically ordered herein is DENIED.
3. The attached Memorandum is incorporated herein by reference.

BY THE COURT:

Elizabeth A. Hayden
Elizabeth A. Hayden

Kurt J. Marben
Kurt J. Marben

Denise D. Reilly
Denise D. Reilly

Judge of District Court

Judge of District Court

Judge of District Court

Dated February 3, 2009

Dated 2/3/09

Dated 2/3/09

MEMORANDUM

I. Introduction

Contestants Cullen Sheehan and Norm Coleman (“Contestants” or “Coleman”) filed a Notice of Contest with the Ramsey County District Court on January 6, 2009, contesting the general election of November 4, 2008 pursuant to Minnesota Statute § 209.021. Contestants seek, in part, an order directing the recounting and retallying of all ballots cast during the general election. This matter is now before the Court upon Contestants’ Motion for Summary Judgment

The Court has been charged with the weighty responsibility of considering the dispute before it in accordance with the laws of the United States and the State of Minnesota while being ever mindful of the overarching goal of ensuring the parties and the citizens of Minnesota a fair and transparent process. Indeed, “[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). This is a responsibility the Court does not take lightly.

The Minnesota Supreme Court has long recognized that “the right to vote is considered fundamental under both the U.S. Constitution and the Minnesota Constitution.” *Kahn v. Griffin*, 701 N.W.2d 815, 830 (Minn. 2005)(citing *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966); *Ulland v. Growe*, 262 N.W.2d 412, 415 (Minn. 1978)); see also *Harman v. Forssenius*, 380 U.S. 528, 537 (1965)(holding the right to vote to be fundamental because it is “preservative of all rights”). “A State indisputably has a compelling interest in preserving the integrity of its election process.” *Purcell*, 549 U.S. at 4 (citing *Eu v. San Francisco County Democratic*

Central Comm., 489 U.S. 214, 231 (1989)). Recently, the Minnesota Supreme Court recognized that “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”

Erlandson v. Kiffmeyer, 659 N.W.2d 724, 730 (Minn. 2003)(quoting *Burson v. Freeman*, 504 U.S. 191, 199 (1992)(quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). The Court also recognizes there is a “strong public policy in favor of finality in elections.” *McNamara v. Office of Strategic and Long Range Planning*, 628 N.W.2d 620, 631 (Minn. Ct. App. 2001)(citing *Greenly v. Independent Sch. Dist. No. 316*, 395 N.W.2d 86, 91 (Minn. Ct. App.1986)).

II. Summary Judgment Legal Standard

Rule 56 of the Minnesota Rules of Civil Procedure is designed to implement the stated purpose of the rules – securing a just, speedy, and inexpensive determination of an action – by allowing a court to dispose of an action on the merits if there is no genuine dispute regarding the material facts, and a party is entitled to judgment under the law applicable to such facts. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

Accordingly, summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law. Minn. R. Civ. P. 56.03. Summary judgment is not intended as a substitute for trial when there are factual issues to be determined. *Naegele Outdoor Advertising Co. of Minneapolis v. City of Lakeville*, 532 N.W.2d 249, 252 (Minn. Ct. App. 1995). Summary judgment is a “blunt instrument” and “should be

employed only where it is perfectly clear that no issue of fact is involved, and it is neither desirable, nor necessary to inquire into facts which clarify the application of the law.”

Donnay v. Boulware, 144 N.W.2d 711, 716 (Minn. 1966).

In considering a summary judgment motion, the court must determine whether there are genuine issues of fact. *Pine Island Farmers Co-op v. Erstad & Reimer*, 649 N.W.2d 444, 447 (Minn. 2002); *DLH, Inc.*, 566 N.W.2d at 70. The substantive law identifies which facts are material. *Bond v. Commissioner of Revenue*, 691 N.W.2d 831, 836 (Minn. 2005). A material fact is one that will affect the outcome or result of a case. *Laska v. Anoka County*, 696 N.W.2d 133, 140 (Minn. Ct. App. 2005).

The burden is on the moving party to show the absence of any genuine issue of material fact. Minn. R. Civ. P. 56.03; *Bixler v. J.C. Penney Co.*, 376 N.W.2d 209, 215 (Minn. 1985). Once the moving party has made a prima facie case that entitles it to summary judgment, the burden shifts to the nonmoving party to produce specific facts that raise a genuine issue for trial. *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. Ct. App. 2001)(citing Minn. R. Civ. P. 56.05; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988)). The party resisting summary judgment must do more than rest on mere averments or unsupported allegations, but must come forward with specific facts to satisfy its burden of production. *Bebo*, 632 N.W.2d at 737; *DLH, Inc.*, 566 N.W.2d at 71; *Hunt v. IBM Mid-Am. Employees Fed. Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986)(“In order to successfully oppose a motion for summary judgment, a party cannot rely upon mere general statements of fact but rather must demonstrate at the time the motion is made that specific facts are in existence which create a genuine issue for trial.”); Minn. R. Civ. P. 56.05. In analyzing a motion for summary judgment, the court

views the evidence in the light most favorable to the party opposing the motion. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

III. Minnesota Statute Sets Forth Four Specific Grounds Upon Which an Election Judge May Reject an Absentee Ballot

The Minnesota Supreme Court has held that “[t]he opportunity of an absentee voter to cast his vote at a public election by mail has the characteristics of a privilege rather than of a right.” *Erlandson*, 659 N.W.2d at 733, n. 8 (quoting *Bell v. Gannaway*, 227 N.W.2d 797, 802 (Minn. 1975)). As such, “the legislature may mandate the conditions and procedures for such voting.” *Id.* The Minnesota Legislature enacted this statute in part to cut down on instances of fraud in our electoral process while allowing individuals who are legally entitled to cast an absentee ballot to do so.

Minnesota law enumerates four specific grounds upon which an election judge may reject an absentee ballot based on the ballot’s return envelope. “The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16. Words and phrases should be construed according to their common and approved usage. Minn. Stat. § 645.08, subd. 1. When the words used are “clear, explicit, unambiguous, and free from obscurity, courts are bound to expound the language according to the common sense and ordinary meaning of the words.” *State ex rel. Gardner v. Holm*, 62 N.W.2d 52, 55 (Minn. 1954). Thus, “[w]hen a statute’s meaning is plain from its language as applied to the facts of the particular case, a judicial construction is not necessary.” *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005).

The relevant statute provides that “[t]wo or more election judges shall examine each return envelope and shall mark it accepted or rejected in the manner provided in this subdivision.” Minn. Stat. § 203B.12, subd. 2. The statute further provides that:

The election judges shall mark the return envelope “Accepted” and initial or sign the return envelope below the word “Accepted” if the election judges or a majority of them are satisfied that:

- (1) the voter's name and address on the return envelope are the same as the information provided on the absentee ballot application;
- (2) the voter's signature on the return envelope is the genuine signature of the individual who made the application for ballots and the certificate has been completed as prescribed in the directions for casting an absentee ballot, except that if a person other than the voter applied for the absentee ballot under applicable Minnesota Rules, the signature is not required to match;
- (3) the voter is registered and eligible to vote in the precinct or has included a properly completed voter registration application in the return envelope; and
- (4) the voter has not already voted at that election, either in person or by absentee ballot.

There is no other reason for rejecting an absentee ballot. In particular, failure to place the ballot within the security envelope before placing it in the outer white envelope is not a reason to reject an absentee ballot.

...

If all or a majority of the election judges examining return envelopes find that an absent voter has failed to meet one of the requirements prescribed in clauses (1) to (4), they shall mark the return envelope “Rejected,” initial or sign it below the word “Rejected,” and return it to the county auditor.

Id. The statute is explicit that “[t]here is no other reason for rejecting an absentee ballot” beyond these four enumerated reasons. *Id.* A citizen who exercises this privilege can register and vote, by the terms of the law, only by complying with its provisions. *See, e.g., Bell*, 227 N.W.2d at 803; Minn. Stat. 203B.12; *see also Matter of Contest of School Dist. Election Held on May 17, 1988*, 431 N.W.2d 911, 915 (Minn. Ct. App. 1988).

Contestants repeatedly raised the specter of *Bush v. Gore*, 531 U.S. 98 (2000) in support of their motion for summary judgment. The Court questions the applicability of

Bush v. Gore to the issues presented in Contestants' Notice of Contest. Florida's basic command for the count of legally cast votes was to consider the "intent of the voter." *Id.* at 105-06. The United States Supreme Court found that while this principle was "unobjectionable as an abstract proposition and a starting principle[,] [t]he problem inheres in the absence of specific standards to ensure its equal application." *Id.* at 106. Unlike the situation presented in Florida in *Bush v. Gore*, the Minnesota Legislature has enacted a standard clearly and unambiguously enumerating the grounds upon which an absentee ballot may be accepted or rejected, as codified in Minn. Stat. § 203B.12, subd. 2. Minnesota has set forth the specific requirements a voter must meet in order to a legally-cast absentee ballot. The objective standards imposed on absentee ballots by Minn. Stat. § 203B.12 distinguishes the election systems of Minnesota and Florida.

IV. Contestants' Motion for Summary Judgment

a. Relevant Facts

On Election Day, approximately 280,000 Minnesota citizens voted by absentee ballot. Of these, election officials rejected roughly 12,000 absentee ballots. During the recount by the Canvassing Board, Coleman filed a lawsuit challenging the manner in which local election officials were determining which absentee ballots would be opened and counted. On this issue, the Minnesota Supreme Court ruled:

Because previously rejected absentee ballots that all agree were rejected improperly should be counted, and in light of the fact that the State Canvassing Board has not yet certified the final results of the recount, we order candidates Norm Coleman and Al Franken and their campaign representatives, the Secretary of State, and all county auditors and canvassing boards to establish and implement a process, as expeditiously as practicable, for the purpose of identifying all absentee ballot envelopes that the local election officials and the candidates agree were rejected in error. The local election officials shall identify for the candidates' review those previously rejected absentee ballot envelopes that were not rejected

on any of the four bases stated in Minn.Stat. § 203B.12 (2006), or in Minn. Stat § 203B.24 (2006) for overseas absentee ballots. Any absentee ballot envelopes so identified that the local election officials and the candidates agree were rejected in error shall be opened, the ballot shall be counted, and its vote for United States Senator added to the total votes cast for that office in that precinct.

Coleman v. Ritchie, 758 N.W.2d 306, 308 (Minn. 2008). Local election officials reviewed the unopened absentee ballots and determined there were approximately 1,350 unopened absentee ballots that were likely rejected in error. In accordance with the Minnesota Supreme Court's Order, the campaigns were given the opportunity to object to these ballots. Ultimately, the campaigns agreed to open 933 of the identified rejected absentee ballots. The absentee ballot return envelopes that local election officials and both candidates agreed were rejected in error were delivered to the Secretary of State and opened and counted on January 3, 2009. Contestants maintain the remaining rejected absentee ballots include absentee ballots that were improperly rejected by local election officials and pray the Court to open and count these ballots.

b. Absentee Ballots Identified by Contestants

Contestants' argued that rejected absentee ballots falling into one of several distinct categories of absentee ballots must be opened and counted. All told, Contestants estimate the number of absentee ballots falling within these categories at 4,500.

i. Absentee ballots not marked "rejected" by local election officials

Contestants identified 321 absentee ballots that were excluded despite being marked "accepted" by local elections officials.

ii. Absentee ballots rejected for no given reason

Contestants identify 163 absentee ballots that were rejected where the reason for rejection cannot be ascertained.

iii. Erroneously rejected absentee ballots

Contestants identify a number of absentee ballots that were rejected as the result of an error of a government official or a local election official, including: (1) 857 absentee ballots rejected for lack of a signature where the pre-printed voter identification sticker affixed to the envelope improperly obstructed the portion of the return envelope instructing the voter to sign the envelope, and (2) 18 absentee ballots rejected because the voter was sent the wrong ballot by election officials.

iv. Absentee ballots excluded despite a showing of substantial compliance

Contestants identified a number of absentee ballots that were rejected despite evidence that the voter substantially complied with Minnesota Statute, including the following:

- 199 rejected because local election officials could not locate the voter's application for an absentee ballot;
- 80 rejected for lack of a voter signature, even though the voter signed the absentee ballot envelope;
- 830 rejected because local election officials could not match the voter's signature on the absentee ballot envelope to the application;
- 42 rejected for lack of witness address information where the address would be easily ascertainable by election officials;
- 131 rejected for lack of complete witness address information;
- 213 rejected for lack of proof of residence, even though the witness indicated such proof was presented by the voter;
- 637 rejected for lack of voter registration despite, in some cases, the voter receiving a "Registered Voter" ballot;

- 1,280 rejected for lack of voter registration, where the voter received a "Non-Registered Voter" envelope;
- 318 rejected for lack of a valid witness;
- 174 rejected as late, despite a lack of evidence that the ballots were received after the applicable deadline; and
- 36 absentee ballots of military personnel serving overseas rejected as late.

V. The Court Is Not Prepared to Grant Summary Judgment Based on the Face of the Absentee Ballot Alone

During the hearing on this matter, Contestants argued the Court can determine as a matter of law that certain absentee ballots were wrongly rejected simply by reviewing the face of the absentee ballot envelope. The Court heard and considered arguments from Contestants in support of their position that there is no fact issue for absentee ballots falling within certain categories and the Court can make certain findings as a matter of law. Contestants argued certain rejected absentee ballots were rejected for a reason other than those specifically enumerated in Minn. Stat. § 203B.12, subd. 2, such that the question presented is purely legal.

The Court views these rejected absentee ballots differently. The Minnesota Supreme Court expressly ordered that "[a]ny absentee ballot envelopes ... that the local election officials and the candidates agree were rejected in error shall be opened, the ballot shall be counted, and its vote for United States Senator added to the total votes cast for that office in that precinct." *Coleman*, 758 N.W.2d at 308. The absentee ballots identified above are disputed and were not opened and counted during the recount.¹

¹ In response to a question from the bench, Contestants acknowledged that relatively few of the 4,500 rejected absentee ballots were presented to the State Canvassing Board or to the Minnesota Supreme Court. According to Contestants, much of these rejected absentee ballots were discovered as a result of relatively new information and were higher in number than Contestants anticipated.

There is insufficient evidence before the Court at this stage in the action to grant summary judgment in favor of Contestants. Contestants rely mainly on their attorneys' affidavits in support of their motion and speculate as to the reasons why a ballot was rejected and in which category it may properly be classified. The Court declines to rely on these affidavits. There is little else in the factual record to support a grant of summary judgment. Contestants have raised factual discrepancies that are best resolved in a full evidentiary hearing. Contestants will have the opportunity to present competent evidence to the Court and may introduce disputed rejected absentee ballots into evidence in their case in chief. Contestants will be afforded the opportunity to call witnesses to testify on their behalf and to engage in meaningful cross-examination of adverse witnesses. For these reasons, and in light of case law which requires the Court to view the evidence in the light most favorable to the non-moving party, the Court finds there are genuine issues of material fact precluding a grant of summary judgment.

VI. Conclusion

For the aforementioned reasons, the Court denies Contestants' Motion for Summary Judgment. Any other relief not specifically ordered herein is denied.