


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FILED
Court Administrator

STATE OF MINNESOTA
COUNTY OF RAMSEY

JAN 20 2009

By  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 from the State of Minnesota,

No. 62-CV-09-56

Cullen Sheehan and Norm Coleman,
Contestants,

**CONTESTEE'S OPPOSITION TO
MOTION FOR ORDER DIRECTING
COUNTIES AND MUNICIPALITIES
TO DELIVER ORIGINAL
REJECTED ABSENTEE BALLOTS
TO THE COURT**

v.

Al Franken,

Contestee.

INTRODUCTION

Approximately 12,000 absentee ballot envelopes were rejected by local officials on Election Day, apparently for perceived deficiencies under Minn. Stat. § 203B.12 (or § 203B.24 for overseas absentee voters). Pursuant to a December 18, 2008, Order of the Minnesota Supreme Court and a protocol agreed to by all parties, local election officials identified 1,346 absentee ballots that they believed they had rejected in error. The Franken and Coleman campaigns ultimately agreed to count 933 of these ballots. Coleman now seeks to have the entire universe of 12,000 rejected absentee ballots shipped to Ramsey County, to be evaluated for at least the third time, regardless of whether any party has ever even *suggested* that a particular ballot was rejected in error.

Coleman's request further disrupts a process designed to be expeditious, while making a mockery of the requirement for specificity and the limited jurisdiction of a court in a state

election contest. Moreover, transfer of the vast bulk of the original ballots is wholly unnecessary, as the parties already have access to information to allow specific objections to rejected absentee ballots. This Court should deny the Motion.

ARGUMENT

I. COLEMAN’S REQUEST FOR THE PRODUCTION OF 12,000 ABSENTEE BALLOTS MUST BE DENIED BECAUSE HIS VAGUE AND NON-SPECIFIED CLAIMS REGARDING THOSE BALLOTS LIE BEYOND THE JURISDICTION OF THIS COURT.

Coleman’s vague, sweeping, and ever-changing claims regarding irregularities in the rejection of absentee ballots by local election officials are beyond this Court’s jurisdiction and therefore cannot provide any basis to order the collection and transportation of the 12,000 ballots rejected by local election officials on Election Day.

As set forth more fully in Franken’s Motion to Dismiss, Minn. Stat. § 209.12 grants only limited jurisdiction to courts reviewing United States Senate election contests. A reviewing court lacks jurisdiction to decide claims that in substance allege “an irregularity in the conduct of an election or canvass of voters” or a “deliberate, serious, and material violation[] of the Minnesota Election Law.” *See* Minn. Stat. § 209.02; *see also* U.S. Const., Art. 1, § 5, Cl. 1; *Odegard v. Olson*, 119 N.W.2d 717 (1963). The Court is limited to deciding which candidate should receive credit for counted votes, and whether each vote so credited was, as a mathematical matter, appropriately counted. Yet, Coleman’s Notice does not, as § 209.12 allows, ask the Court to collect evidence for the purpose of forwarding it to the Senate—where such irregularities are appropriately adjudicated. Because the Court lacks jurisdiction to adjudicate Coleman’s allegations of irregularities regarding the rejection of absentee ballots, and because Coleman does not ask for evidence preservation for purposes of Senate adjudication, the ballots in question are simply not relevant and should not be collected and transferred.

Even if election irregularities could be resolved by this Court, the sweeping and exceedingly general allegations in Coleman’s Notice as to unidentified absentee ballots fail to state a claim upon which relief can be granted. Claims of irregularities in an election contest must be “definite and specific.” *Soper v. Board of County Com’rs of Sibley County*, 48 N.W. 1112 (Minn. 1891); *see also* Minn. Stat. § 209.021. As discussed in Franken’s Motion to Dismiss, it is well-settled, and critical to the timely functioning of an election contest, that insufficiently specific claims be dismissed on the pleadings.

Coleman’s Notice of Contest is characterized throughout by its opacity and vagueness. The Notice’s paragraphs concerning absentee ballots are among the worst offenders. *See* Notice ¶¶ 10, 11. Coleman fails to make definite and specific claims regarding rejected absentee ballots, instead emphasizing that his allegations are “[b]y way of example only” and that the examples provided are “inclu[sive] [but] without limitation.” *Id.* This sort of pleading flouts the clear statutory command for specificity in election contest pleadings and cannot withstand a motion to dismiss.

Because the Court must dismiss Coleman’s vague claims that some undefined universe of absentee ballots was rejected in error, the requested ballots are simply irrelevant to the proceedings and there is no need to transfer them to the Court. An election contest is a forum to resolve a specific challenge to an election—not to determine whether grounds to do so exist in the first instance.

II. AT MOST, ONLY THE BALLOTS PREVIOUSLY IDENTIFIED BY COLEMAN AND THE ADDITIONAL BALLOTS IDENTIFIED BY FRANKEN ARE RELEVANT TO THIS COURT'S PROCEEDINGS.

Even if the absentee ballot claims in Coleman's Notice could be adjudicated, this Court should deny his sweeping request for the collection, transport, and deposit of 12,000 ballots. If Coleman truly believes that all 12,00 should be opened and counted, his Notice should have so claimed.

At most, Coleman's vague and scattershot pleadings call into question the rejection of 654 ballots. *See* Notice ¶ 10 & Exhibit B; *see also Coleman v. Ritchie*, ___ N.W.2d ___, 2009 WL 20954 (Minn. 2009). He contends that election officials may have erred in rejecting these ballots.¹

The Franken Campaign has provided or will provide far more specific information about absentee ballots that were or may have been rejected in error by election judges and local election officials, and which were not included on the list of 1,346 wrongfully rejected absentee ballots created by local election officials, and were not counted as part of the recount. *See* Answer, Second Counterclaim. For many of the voters identified, Franken has offered declarations or other supporting documentation demonstrating that local election officials rejected each ballot in error. *See id.*, Ex. 5. Franken submits that any adjudication of this evidence, if necessary, should be performed by the United States Senate, but to the extent the Court believes that any subset of ballots identified by Coleman should be transported to the Court for examination, so too should the ballots that are already identified or that might be identified by Franken. Ballots identified by neither party, however, need not be disturbed.

¹ Notably, however, when Coleman previously submitted this particular list of 654 ballots to election officials, he did so after the mutually agreed upon deadline for doing so had passed, and a common thread among these 654 ballots was that they were cast in areas which favored Coleman. For example, 94 are from Dakota County, which Coleman won by 8%, and 64 are from the City of Plymouth, which Coleman won by 12%. Other jurisdictions

III. TRANSPORT AND DEPOSIT OF 12,000 ORIGINAL BALLOTS IS UNNECESSARY AND WASTEFUL WHERE ALL NECESSARY INFORMATION IS GENERALLY ALREADY AVAILABLE TO THE PARTIES.

Assuming, *arguendo*, that some number of rejected absentee ballots will be examined by this Court, Coleman's request that the counties transport 12,000 original rejected absentee ballots is wholly unnecessary and a gratuitous waste of resources. Pursuant to Minn. Stat. § 203B.12, election officials must accept an absentee ballot received by Election Day if:

- (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.

Thus, determining whether a ballot was or was not rejected in error generally requires, at most, a consideration of the face of the absentee ballot envelope, the absentee ballot application, and registration records. Copies of the envelopes and absentee ballot application, and online access to the registration data, are readily available to the parties. *See* Contestants' Response to Contestee's First Set of Interrogatories, at 6. They can be introduced into evidence, discussed by witnesses, and examined by the Court, and the Court simply has no need to examine an original absentee ballot envelope to determine whether the ballot was rejected in error.

Should the Court determine that it possesses jurisdiction to resolve Coleman's claims of irregularities with respect to the counting of absentee ballots and that Coleman can challenge the

where Coleman won by more than 20% are heavily represented: 32 from Scott County; 31 from Carver County; 23

rejection of ballots unidentified in his Notice of Contest, and should the Court determine that such ballots were indeed rejected in error, *then* that number of ballots can be transported to the Court—or more properly, the Senate—to be opened and counted. Nothing further is either appropriate or warranted at this point, and the Court need not order counties to incur significant expense shipping 12,000 absentee ballots just in case.

Finally, Coleman’s request that all parties involved spend their time managing irrelevant ballots ignores the “strong public policy in favor of finality in elections.” *Greenly v. Independent School Dist. No. 316*, 395 N.W.2d 86, 91 (Minn. App.1986); *see also Franson v. Carlson*, 137 N.W.2d 835, 840 (Minn. 1965) (“[T]he whole system [is] intended to expeditiously dispose of election contests. . . . [T]he general idea inherent in the statute [is] that there may be a speedy determination of these matters”); *Hunt v. Roloff*, 28 N.W.2d 771, 776 (Minn. 1947) (Matson, J., concurring) (“The legislature has wisely provided a summary and strict procedure to avoid intolerable delay in the adjudication of election contests.”). Coleman’s request that the Court order officials from 87 counties and many cities throughout Minnesota to ship 12,000 absentee ballots to the Court regardless of whether he has even alleged that a particular ballot was rejected in error is an open invitation for warrantless delay.


CONCLUSION

For the reasons stated above, this Court should deny Contestant’s Motion for an Order Directing Counties and Municipalities Possessing Original Rejected Ballots to Deposit Originals with the Court.

from Sherburne County; and 15 from Wright County. *Id.* at ¶ 19.

Dated January 20, 2009.

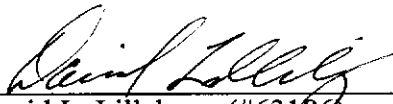
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