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STATE OF MINNESOTA
COUNTY OF RAMSEY

FILED
Court Administrator
JAN 21 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,

v.

Al Franken,

Contestee.

**MEMORANDUM OF LAW IN SUPPORT OF
CONTESTEE FRANKEN'S CONDITIONAL MOTION FOR
PARTIAL SUMMARY JUDGMENT ON CERTAIN
OF CONTESTEE'S COUNTERCLAIMS**

I. INTRODUCTION

Minnesota election law sets forth four specific and exclusive circumstances under which local election officials can reject an absentee ballot. Contestee Al Franken has identified numerous absentee ballots – including the 134 addressed in this Motion – that remain uncounted even though they do not fall within any of the four statutory grounds. If the Court determines that it has the jurisdiction to correct such irregularities and violations of law,¹ then each of these ballots must be opened and counted. As to this set of ballots, there are no material issues of fact in dispute and the question presented is purely legal. Because there is no lawful basis for the

¹ As an initial matter, Contestee Al Franken draws the Court's attention to his pending Motion to Dismiss which seeks dismissal of the Notice of Contest on the ground, among others, that this Court lacks jurisdiction and that Coleman's claims fall outside the scope of Minn. Stat. § 209.12. Should the Court grant Contestee's Motion to Dismiss, the instant motion would be moot. However, and without waiving his argument as to the proper scope of what the Court can adjudicate, the expedited nature of these proceedings makes it necessary for Franken to brief conditionally this motion in advance of resolution of the Motion to Dismiss.

rejection of these ballots, Contestee Franken respectfully moves this Court for an order granting summary judgment with respect to the entire set.

II. STATEMENT OF THE ISSUES

1. Whether 35 lawfully cast absentee ballots, which remain unopened due to a statutorily impermissible reason (date mismatches), should be opened and counted.
2. Whether 99 lawfully cast absentee ballots, which remain unopened due to a statutorily impermissible reason (that is, for a reason not set forth in Minn. Stat. § 203B.12, subd. 2), should be opened and counted.

III. STATEMENT OF THE RECORD

This motion is based on the following documents:

1. The Affidavit of Kevin J. Hamilton in Support of Contestee Franken's Conditional Motion for Partial Summary Judgment on Certain of Contestee's Counterclaims ("Hamilton Aff.").
2. A true and correct copy of the Minnesota Supreme Court's Order dated December 18, 2008, attached as Exhibit A to the Hamilton Aff.
3. A true and copy of the Minnesota Supreme Court's Order dated December 24, 2008, attached as Exhibit B to the Hamilton Aff.
4. A true and correct copy of the agreed protocol reached between the parties and local election officials for addressing erroneously unopened absentee ballots, attached as Exhibit C to the Hamilton Aff.
5. A true and correct copy of materials (including absentee-ballot envelopes and affidavits) relating to 13 ballots that were lawfully cast yet remained unopened, attached as Exhibits D through P to the Hamilton Aff.
6. A true and correct copy of the uncertified transcript of the State Canvassing Board meeting on December 12, 2008, attached as Exhibit Q to the Hamilton Aff.
7. Exhibits C and D to Contestee's Answer and Counterclaim.

IV. STATEMENT OF UNDISPUTED MATERIAL FACTS

During the recount, Coleman filed a lawsuit challenging the manner in which local election officials were addressing absentee ballots that might have remained unopened and uncounted on improper grounds. The relief granted was an order to create a protocol under

which absentee ballots that local officials determined had been improperly rejected during the election could be opened and counted after the unanimous consent of both campaigns. *See* Affidavit of Kevin J. Hamilton in Support of Contestee Franken's Conditional Motion for Partial Summary Judgment on Certain of Contestee's Counterclaims ("Hamilton Aff.") at Exs. A, B & C.

Working well into the afternoon on Christmas Eve, the Secretary of State's Office, local officials, and the two candidates agreed to a protocol for this process. *Id.* at ¶ 3 & Ex. C. Local officials in election and county attorneys' offices throughout the state worked long hours throughout the holiday week to identify erroneously rejected absentee ballots and to furnish both candidates with lists of ballots they believed should be opened and counted. *Id.* at ¶ 4. By the close of business on Friday, December 26, the local officials' lists totaled approximately 1,350 absentee ballots from 60 counties. *Id.*

Campaign representatives were given the opportunity to object to the approximately 1,350 identified absentee ballots. *Id.* at Ex. C. Eventually the campaigns reached agreement that 933 of the nearly 1,350 absentee ballots identified by local officials would be opened and counted. *Id.* at ¶ 5. These absentee ballots were sent to the Secretary of State's Office where they were opened and counted in the presence of campaign representatives. *Id.*

Of the more than 400 absentee ballots that were not agreed upon, 35 were from Duluth, in St. Louis County. *Id.* There, Coleman's authorized representative refused to allow them to be opened and counted solely because the date the voter filled in on the absentee ballot return envelope did not match the date inserted by the voter's witness. *Id.* That the voter and her witness dated (or even signed) the envelope on different days, however, is not one of the four statutory reasons upon which an absentee ballot can be rejected. Indeed, as Deputy Secretary of

State Jim Gelbmann has confirmed, there is nothing in the statute that would permit rejection of ballots based solely on date mismatch. *Id.* at Ex. Q. As a consequence, these 35 individuals have been disenfranchised because their lawfully cast ballots have never been opened or counted despite the desire of local officials to correct their errors. Copies of the absentee-ballot envelopes at issue (along with related materials) are attached as Exhibit C to Contestee's Answer and Counterclaim, and the ballots are identified by voter on Attachment 1 to this Memorandum.

Among the numerous other ballots that should have been opened were 13 ballots that evidence (accompanying this Motion) shows were lawfully cast. Pursuant to the protocol, officials had identified these 13 ballots as having been impermissibly rejected. The officials' assessment was accurate, and the votes should have been counted. Copies of these 13 absentee ballot envelopes have been provided to the Court, *see* Hamilton Aff. at Ex. D-P, and the ballots are identified by voter name on Attachment 2 to this Memorandum.

Finally, there are 86 additional unopened and uncounted absentee ballots – among an even greater number of ballots Franken has identified in his Counterclaims to bring before this Court at trial, if a trial is necessary – that do not fall within any of the four statutory grounds for rejection. These 86 ballots were not identified by the officials during the protocol and, as a result, were never presented to the candidates to approve their opening. As Franken's evidence makes clear, however, they were lawfully cast. Copies of these 86 absentee-ballot envelopes (along with related materials) are attached as Exhibit D of Contestee's Answer and Counterclaim and are identified on Attachment 3 to this Memorandum.

In short, these 134 lawfully cast ballots were rejected in error. With respect to the 35 from Duluth, there is no dispute that these ballots were rejected solely by Coleman and because of date mismatches, which is an impermissible ground upon which to reject an absentee ballot.

With respect to the remaining 99, Franken has provided this Court with evidence erasing any doubt that the absentee ballots were rejected impermissibly. There is no evidence to the contrary. As a result, summary judgment is appropriate.

V. ANALYSIS

A. Summary Judgment Standard

Summary judgment is proper under Rule 56 of the Minnesota Rules of Civil Procedure where there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). To defeat a summary judgment motion, the non-moving party must, at the time the summary judgment motion is brought, demonstrate the existence of specific facts which create a genuine issue for trial. *See Gorath v. Rockwell Int'l, Inc.*, 441 N.W.2d 128, 131 (Minn. Ct. App. 1989). Summary judgment “is mandatory against a party who fails to establish an essential element of [the] claim, if that party has the burden of proof, because this failure renders all other facts immaterial.” *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. Ct. App. 2001) (emphasis added).

B. Minnesota Law Forbids Local Election Officials From Rejecting Lawfully Cast Absentee Ballots Because of Mismatched Dates

Minn. Stat. § 203B.12, subd. 2 governs the circumstances under which an election judge may reject an absentee ballot based on the ballot’s return envelope. That statute provides, in pertinent part:

Examination of return envelopes. Two or more election judges shall examine each return envelope and shall mark it accepted or rejected in the manner provided in this subdivision. . . . 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.

Minn. Stat. § 203B.12, subd. 2 (emphasis added).

In short, the statute only lists four discrete bases for rejection. In addition, the Legislature strongly reiterates that there is *no other reason* to reject an absentee ballot. The statute simply does not allow an election judge to reject an absentee ballot because the date next to the voter's signature on the envelope does not match the date next to the witness's signature on the envelope.

This point is underscored by Minn. Stat. § 203B.07, subd. 3, which governs the form and content of the certifications to be signed by both the voter and his or her witness:

Eligibility certificate. A certificate of eligibility to vote by absentee ballot shall be printed on the back of the return envelope. The certificate shall contain a statement to be signed and sworn by the voter indicating that the voter meets all of the requirements established by law for voting by absentee ballot. The certificate shall also contain a statement signed by a person who is registered to vote in Minnesota or by a notary public or other individual authorized to administer oaths stating that:

- (1) the ballots were displayed to that individual unmarked;

(2) the voter marked the ballots in that individual's presence without showing how they were marked, or, if the voter was physically unable to mark them, that the voter directed another individual to mark them; and

(3) if the voter was not previously registered, the voter has provided proof of residence as required by section 201.061, subdivision 3.

Minn. Stat. § 203B.07, subd. 3, *see also* Minn. R. 8210.0500. Under this statute the witness need only sign the envelope and certify that she was shown an unmarked ballot by the voter, that the voter or her designee, if the voter is disabled, marked the ballot in secret, and that the voter provided the witness with proof of residence if not previously registered.²

Moreover, there is no requirement that the witness date, or even sign, the witness's certification at the same time the voter completes their own certification. *Id.*; *see also* Minn. R. 8210.0600. The witness is fully entitled to sign later, as surely often happens with busy couples. Nor is disenfranchisement permissible simply because either the voter or the voter's witness got the date wrong.

The 35 lawfully cast ballots described herein were rejected for a reason not allowed under Minnesota law. The facts surrounding their rejection are not in dispute. Minnesota law on the issue could not be clearer. Summary judgment, Contestee respectfully submits, is appropriate. As such, these ballots must now be opened, counted, and included in the Court's final determination of whether Franken or Coleman received the greatest number of legal votes in the November 4, 2008, election for United States Senator.

C. The 99 Ballots Identified in Attachments 2 and 3 Do Not Fall Within the Four Statutory Grounds for Rejection, So They Must Be Opened and Counted.

As set forth above, there are only four grounds upon which an election judge can reject an absentee ballot based on the ballot's return envelope. *See* Minn. Stat. § 203B.12, subd. 2.

² While the certification on the absentee envelope requires the witness to certify that the voter enclosed and sealed the ballot in its secrecy envelope, no such certification requirement is found in Minn. Stat. 203B.07, subd. 3.

The law is unequivocal that “[t]here is *no other reason* for rejecting an absentee ballot.” *Id.* (emphasis added).

While there are a few different explanations for why the 99 ballots identified in Attachments 2 and 3 were rejected, none survives scrutiny. For some of the ballots, the reasons were not found among the four listed by statute and are therefore impermissible; for others, the reasons were, on their face, simply inapplicable to the ballot at hand; and, for still others, no reason existed at all.

As to each of these ballots, Franken has submitted to this Court evidence sufficient to erase any doubt that the purported justification (if any) for rejection is untenable and cannot be upheld. *See* Hamilton Decl. at Ex. D-P; Contestee’s Answer and Counterclaim at Ex. D. As this undisputed evidence makes clear, the ballots fall within none of the four grounds upon which an election judge can reject an absentee ballot – and, as a result, they should have been opened and counted on Election Day.³

In short, the facts as they relate to these 99 absentee ballots, which are not in dispute, show beyond a doubt that there is no basis under Minnesota law for rejection. The only legal question is the scope of the Court’s jurisdiction to provide a remedy at this point and in light of the Senate’s ultimate role in determining its membership.

VI. CONCLUSION

For the foregoing reasons, Franken respectfully requests the Court grant his Conditional Motion for Partial Summary Judgment and order that the 134 absentee ballots identified in this

³ Many of the 99 ballots identified in Attachments 2 and 3 are the same as those identified in the suit brought by Dennis Peterson, et. al. (“Petitioners”). There are ballots addressed by Petitioners that are not addressed in this Motion, and vice versa. In an effort to spare the Court overlapping briefing, Franken will not discuss each ballot individually but rather respectfully refers the Court to the exhibits identified above, as well as the Memorandum of Law in Support of Motion for Summary Judgment filed by Petitioners in their parallel litigation.

Motion (including the 35 identified in Attachment 1, the 13 identified in Attachment 2, and the 86 identified in Attachment 3) should have been opened, counted and included in the final election tally.

Dated: January 21, 2009.

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