

JAN 21 2009

By CW Deputy

34

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,

No. 62-CV-09-56

Cullen Sheehan and Norm Coleman,

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

Contestants,

v.

Al Franken,

Contestee.

I. INTRODUCTION¹

As the Minnesota Supreme Court has explained, "no 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." *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 729 (Minn. 2003) (quoting *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964))). Yet Contestants Cullen Sheehan and Norm Coleman ("Coleman") in Paragraphs 12(b) and (c) of their Notice of Contest ask this Court to disregard over one hundred and thirty

¹ Contestee Al Franken draws the Court's attention to his pending Motion to Dismiss which, among other things, seeks dismissal of the claims of Contestants Coleman and Sheehan ("Coleman") with respect to the claims addressed in this Motion on the grounds that: (1) this Court lacks jurisdiction in light of deficiencies in the Notice of Contest; (2) Coleman's claims fall outside the scope of this Court's review because he seeks to correct alleged "election irregularities" rather than pursue remedies available under Minn. Stat. § 209.12; and (3) Coleman's claims fall to state a claim upon which relief can be granted. If the Court grants Franken's Motion to Dismiss as to these claims, this motion is 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.

ballots that were lawfully cast on Election Day in Minneapolis Precinct 3-1 ("Minneapolis 3-1") that have since been lost, and well over one hundred and seventy lawfully cast absentee ballots from Maplewood Precinct 6 ("Maplewood 6") that were discovered during the recount after having been inadvertently uncounted on Election Day. Well-established law and common sense dictate that: (1) because the missing ballots could not be located during the recount, the Election-Day return provided by Minneapolis 3-1 was the best evidence of the votes cast in that precinct; and (2) lawfully cast absentee ballots that were inadvertently not counted on Election Day in Maplewood 6 were properly opened and counted as a part of the recount. For precisely these reasons, the State Canvassing Board unanimously adopted the Election Day returns for Minneapolis 3-1 and included the Maplewood 6 ballots in its final statewide election certification. Any other result would disenfranchise over three hundred Minnesota voters and undermine the integrity of the election.

For the reasons provided below, Contestee Franken respectfully requests the Court grant his Conditional Motion for Partial Summary Judgment and dismiss Coleman's claims regarding the missing ballots from Minneapolis 3-1 and the previously uncounted absentee ballots from Maplewood 6.

II. STATEMENT OF THE ISSUES

1. Whether the State Canvassing Board acted properly when it unanimously adopted the Election Day returns for Minneapolis 3-1.
2. Whether the State Canvassing Board acted properly when it unanimously included the Maplewood 6 ballots in its final statewide election certification.

III. STATEMENT OF THE RECORD

This motion is based on the following documents:

1. The Deposition of Cynthia Reichert, which consists of a copy of the hearing transcript from the State Canvassing Board's hearing in this matter, held on December 12, 2008.

2. A true and correct copy of Cynthia Reichert's Dec. 10, 2008, report to the State Canvassing Board ballots that were counted on Election Day in Minneapolis 3-1 and which subsequently went missing.

3. A true and correct copy of those portions of the Deposition of Cynthia Reichert taken on January 19, 2009, relied upon in this Motion.

4. A true and correct copy of Exhibit 58 to the Deposition of Cynthia Reichert, which consists of a Dec. 4, 2008 email from Cindy Reichert to Pat Shortridge regarding the measures taken to search for the missing ballots.

5. A true and correct copy of those portions of the Deposition of Joseph Mansky taken on January 15, 2009, relied upon in this Motion.

6. A true and correct copy of Exhibit 5 to the Deposition of Joseph Mansky, which consists of Joseph Mansky's Dec. 4, 2008, report to Secretary of State Mark Ritchie regarding the number of ballots cast in Maplewood Precinct 6.

7. A true and correct copy of Exhibit 3 to the Deposition of Joseph Mansky, which consists of the polling place incident log for Maplewood Precinct 6.

8. A true and correct copy of Exhibit 8 to the Deposition of Joseph Mansky, consisting of electronic correspondence among local election officials regarding the number of ballots cast in Maplewood Precinct 6.

9. A true and correct copy of Exhibit 6 to the Deposition of Joseph Mansky, which consists of a Dec. 17 letter from Joseph Mansky to Secretary of State Ritchie concerning the number of ballots cast in Maplewood Precinct 6.

10. A true and correct copy of Exhibit 4 to the Deposition of Joseph Mansky, which consists of a Dec. 2, 2008, letter from Deputy Secretary of State Jim Gelbmann to Joseph Mansky regarding the number of ballots cast in Maplewood Precinct 6.

11. A true and correct copy of Contestants' Answer to Contestee Al Franken's Interrogatory No. 12, including the exhibit referenced therein.

IV. STATEMENT OF UNDISPUTED MATERIAL FACTS

A. The Missing Ballots From Minneapolis 3-1

1. Over One Hundred Ballots in Minneapolis 3-1 Were Counted on Election Day but Have Since Been Lost

On Election Day, 2,028 individuals voted in Minneapolis 3-1.² See Affidavit of Crystal Patterson ("Patterson Aff.") at Ex. A (Deposition of Cynthia Reichert ("Reichert Dep.") Ex. 49 (Tx. of State Canvassing Bd. Mtg. (Dec. 12, 2008) (Bd. Mtg.) at 24:9-18); see also Patterson Aff. at Ex. B (Reichert Dep. Ex. 25) (Reichert Letter to Canvassing Bd. (Dec. 10, 2008) ("Reichert Ltr.")).³ Yet only 1,896 ballots were produced for the recount in Minneapolis 3-1. Those ballots were in white Tyvek envelopes marked "2 of 5," "3 of 5," "4 of 5" and "5 of 5," respectively. Deposition of Cynthia Reichert ("Reichert Dep."), 120:24-121:6.⁴ As Reichert, the Elections Director for the City of Minneapolis and the Assistant City Clerk, reported to the State Canvassing Board (the "Board"), after reviewing the ballots from Minneapolis 3-1 "[i]t was obvious to us at that time that there was no 1 of 5." Bd. Mtg. at 12:2-6.

Reichert conducted an investigation and found that the machine tape at Minneapolis 3-1 tallied 2,028 ballots. Reichert Dep., at 140:7-15. The sum of voters obtained from adding the roster at the precinct; the in-person new registrants; and the accepted absentee ballots corresponded to a total of 2,030 potential ballots. Reichert Ltr.; see also Reichert Dep., 135:14-140:6. Reichert explained to the State Canvassing Board that the discrepancy between the 2,030 potential ballots and the 2,028 counted ballots as follows: "It's not unusual in a busy election to have persons sign in on the roster, receive their voter receipt, get a call from a baby sitter or

² This Motion cites exhibits attached to the January 19, 2009 deposition of Cynthia Reichert. These citations include two exhibit numbers. The first refers to the affidavit exhibit number, and the second refers to the deposition exhibit number.

³ While Coleman attaches a number of documents pertaining to Minneapolis 3-1 as Exhibit G to his Notice of Contest, Franken notes that Exhibit G is an almost disingenuously incomplete record of the events surrounding the missing ballots in Minneapolis 3-1. Many of the facts and theories about what happened to the missing ballots from Minneapolis 3-1 described in the documents and argumentative position statements from counsel that are included in Exhibit G have been conclusively determined to be in error based on Reichert's report and testimony to the Board, and Reichert's own deposition testimony. There is no reason to believe that Reichert would testify in a manner inconsistent with her prior testimony. Moreover, the key fact for this Court is that the Board correctly determined based on Reichert's report and testimony that the ballots from envelope "1 of 5" were missing. How the ballots went missing is irrelevant because they were counted and included in the Minneapolis 3-1 Election Day return before they were lost.

⁴ Those portions of Reichert's deposition relied on in this motion are attached to the Patterson Aff. at Ex. C.

decide that – there’s some reason they just leave the precinct, so it’s not unusual for those numbers to be off by one or two. We believe there were 2,028 ballots fed into the ballot counter that evening.” Bd. Mtg. at 24:9-18. Finally, Reichert confirmed that the number of ballots actually produced on December 3, 2008 was only 1,896. *See generally* Reichert Ltr.; Reichert Dep., 140:17-141:4. In short, more than 130 ballots were missing. *See* Reichert Ltr.

Ultimately, there is no doubt that the ballots were and are missing. According to Ms. Reichert, officials undertook a comprehensive search for the ballots.⁵ Indeed, Ms. Reichert, in testimony to the Board, detailed efforts undertaken by her, her staff, election officials, representatives from both campaigns, and even the media to locate the missing ballots. Reichert, her staff, and others “looked every place [they] could think of, both logical and illogical” for the missing ballots, without success. Bd. Mtg. at 17:1-2. As a result, Deputy Secretary of State Jim Gelbmann stated during a December 5 interview, “There clearly is an envelope missing. There clearly are 133 ballots missing.”⁶

2. The Board Correctly Adopted Election Day Returns

On December 12, 2008, Reichert recounted her investigation and effort to locate the missing ballots to the Board and requested “that the . . . [B]oard move to use the results that were counted by the precinct ballot counter [on election] night in lieu of having the actual hand count of the ballots themselves.” Bd. Mtg. at 19:9-13. In an exchange with Election Judge Cleary before the Board, Reichert confirmed her belief in the validity of the election night totals:

Mr. Cleary: So after reviewing all the signatures and the registrants and the absentee ballots you’re convinced the election night totals are the proper totals?

Reichert: I am convinced those are correct.

⁵ *See, e.g.*, CNN, *Missing ballots stall Minnesota Senate recount*, Dec. 4, 2008, available at <http://www.cnn.com/2008/POLITICS/12/04/minnesota.recount/index.html>; Reichert Dep., at 120:25-125:4; Patterson Aff. at Ex. D (Reichert Dep. Ex. 58) (Dec. 4, 2008 email from Cindy Reichert to Pat Shortridge).

⁶ *The Uptake, Overseas Ballots Discovered in Minneapolis*, Dec. 5, 2008, available at <http://www.youtube.com/watch?v=JVIXzRACKO0>.

Bd. Mtg. at 23:22-24:2.

In support of Reichert's recommendation, Minnesota Attorney General Lori Swanson advised the Board that: "If as a matter of fact, you believe [the missing ballots were actually cast and counted on Election Day], then I believe there is authority pursuant to the 2002 [Attorney General's Opinion of Minnesota law to include the election night returns" because those returns are the "best evidence" of the vote for Minneapolis 3-1. Bd. Mtg. at 19:21-21:3. The Opinion referenced by Attorney General Swanson is based on the Minnesota Supreme Court's Decision in *Moon v. Harris*, 142 N.W. 12, 14 (Minn. 1913). Bd. Mtg. at 19:21-21:3.

Following testimony from Reichert and Swanson, Secretary of State Ritchie presented two issues to the Board:

It seems like there are two items in front of us. In general terms one is, do we think there are missing ballots? Do we think the number indicated by machine is equal to the number of people who voted? And then the second question is, what do we do if there are missing ballots, which is, what is the report from the election officials responsible for this particular election?

Bd. Mtg. at 25:5-12. The Board, considering these issues, determined that the Election Day returns presented by Reichert were "prima facie" evidence of the vote in Minneapolis 3-1 and unanimously decided to accept those returns. Bd. Mtg. at 25:19-28:4.

Coleman now challenges the Board's decision:

12. [E]rroneously and wrongfully included in the vote totals certified by the Board were significant and material number of:

...

(c) Alleged Ballots which were not located or viewed during the Recount but which were "counted" during the Recount and included within Recount totals because they were deemed "missing" by the Board, despite any evidence that such alleged Ballots were actually missing and contrary to Minnesota case law. This occurred in the City of Minneapolis Ward 3 Precinct 1. Accordingly, the Board erroneously and inconsistently certified election-night

numbers from the precinct, despite the fact that the Board did *not* certify election-night numbers from any other precincts during the Recount, including without limitation, the precincts identified within Exhibit C and Exhibit E attached hereto. True and correct copies of documents relating to the City of Minneapolis Ward 3 Precinct 1 are attached as Exhibit G hereto and incorporated herein by reference.

Notice of Contest at Paragraph 12(c).

Franken respectfully submits, for the reasons set forth below, that the decision of the Board was correct as a matter of law, and the Court should dismiss Coleman's claims with respect to Minneapolis 3-1.

B. The Uncounted Absentee Ballots From Maplewood 6

1. Election Judges in Maplewood 6 Inadvertently Failed to Count 177 Absentee Ballots on Election Day

On Election Day, Maplewood 6 received its absentee ballots late in the evening, around 5:30 or 6:00 p.m., for counting. Deposition of Joseph Mansky (Jan. 15, 2009) ("Mansky Dep.") at 24:6-26:5.⁷ The election judges began counting these ballots by inserting an absentee "header card" into the precinct's ballot counter and running the ballots through. *Id.* & Patterson Aff. at Ex. F (Mansky Dep. Ex. 5). Header cards are used to record the types of ballots being counted – absentee versus ballots cast the day of the election. *Id.* Shortly thereafter voter traffic in Maplewood 6 picked up significantly as individuals came in after work to vote. *Id.* As a result, the election judges set aside a large number of uncounted absentee ballots and returned the ballot counter to "normal" operation. *Id.*

At the end of voting, an "ender card" is inserted into the ballot counter which triggers the counter to report the Election Day returns by printing a return tape. *Id.* at 24:6-25:5, 49:3-14 & Ex. 5. Once the "ender card" is inserted no additional ballots can be run through the counter. *Id.* The election judges in Maplewood 6 inserted the "ender card" into the ballot counter after normal

⁷ Those portions of Mansky's deposition and exhibits thereto on which this Motion relies are attached to the Patterson Aff. at Ex. E.

voting was completed, but before running the remaining absentee ballots through the counter.

Id. As a result, those ballots were not included in the counter's Election Day returns.

There was nothing to suggest to local election officials on Election Day that nearly two hundred absentee ballots had not been counted in Maplewood 6 because: (1) the election judges did not report the uncounted ballots to the county; (2) they did not complete an incident report; and (3) they did not report any discrepancies between the number of registered voters versus ballots counted. *Id.* at 32:5-15, 33:11-21 & Patterson Aff. at Ex. G (Mansky Dep. Ex. 3).

Nevertheless, the election judges did place the 177 uncounted absentee ballots into the Maplewood 6 transfer case. *Id.* That case was sealed using three separate seals – two paper seals signed by the Election Judges, and one additional plastic seal used by Ramsey County as an additional security measure. *Id.* at 24:6-26:5; 37:3-18. Ramsey County Elections Manager Joseph Mansky confirmed the chain of custody for these ballots:

[I]n fact, all of the ballots were properly sealed up in the transfer case. The reason we know that is that the transfer cases left the polling place on election night sealed; were returned to the Maplewood city clerk in that condition, were delivered to our office from Maplewood on the Thursday after election day sealed, and were not unsealed until the morning of December 2nd, which is when we did the, the recount for that precinct.

Id. at 36:14-23. The 177 uncounted absentee ballots remained in the transfer case until it was opened as a part of the recount.

2. During the Recount the 177 Uncounted Absentee Ballots Were Discovered

The election judge who recounted Maplewood 6 discovered that there were more ballots in the Maplewood 6 transfer case than were reflected on the summary tape. *Id.* at 22:21-23:1. The discrepancy was also apparent because there were less than 100 absentee ballots reflected on the summary tape while there were well over 200 absentee ballots in the transfer case. *Id.* at

24:6-26:5. The absentee ballots were easily distinguished from the other ballots because they had been folded to fit inside return envelopes. *Id.* at 24:6-26:5.

Mansky investigated and determined that 272 absentee ballots were received in the transfer case as compared to 95 absentee ballots reported on the results tape, leaving a balance of 177 ballots that had not been processed at the polling place. Patterson Aff. at Ex. H (Mansky Dep. Ex. 8). Mansky also compared the number of ballots in the transfer case to the number of ballot receipts and the number of voters listed on the polling roster – the combination of pre-registered voters who signed into the polling place, voters who registered in person at the polling place, and absentee voters who returned ballots to the precinct. *Id.* at 38:21-39:19. From this count Mansky determined that 1,564 ballots were cast in Maplewood 6, Mansky Dep. at Ex. 5, as compared to the 1,568 individuals who were reflected on the precinct's ledgers, Patterson Aff. at Exs. I (Mansky Dep. at Ex. 6).⁸ Based on this information Mansky concluded that the number of ballots in the transfer case reflected the true number of people voting (either in-person or absentee) in Maplewood 6. *Id.* at 39:12-40:4. Because there was no question the ballots were lawful and had simply been overlooked, they were opened and counted as a part of the recount, a result also urged by Secretary of State Ritchie in a December 2, 2008, letter to Mansky. *Id.* at 23:9-13 & Patterson Aff. at Ex. J (Mansky Dep. Ex. 4)

Despite the fact that these ballots were lawfully cast on Election Day and the fact that the election judges simply did not count these ballots due to their own oversight, Coleman now asks the Court to disenfranchise 177 absentee voters, alleging:

⁸ Mansky initially reported on December, 4, 2008, that only 1,560 persons had voted in Maplewood 6. However, Mansky later learned that he had failed to include 8 persons on the precinct's UOCAVA roster – individuals serving in the armed forces overseas who can vote under federal law without being registered in Minnesota. Mansky Dep. at 42:3-19. Adding these eight individuals to the precinct's totals led to a total of 1,568 voters, the total number Mansky subsequently reported to the Secretary of State's Office on December 17, 2008. Mansky Dep. at Ex. 6.

Ballots which were not counted on election night but were "found" and counted during the Recount (despite lack of any change of custody or other assurance or evidence of the reliability or integrity of such Ballots), which Ballots exceed the number of persons who voted in such precincts on Election Day. This occurred in numerous precincts throughout the State of Minnesota including, without limitation, the precincts described within Exhibit E attached hereto and incorporated herein by reference. True and correct copies of documents relating to these precincts are attached as Exhibit F hereto and incorporated herein by reference.

Notice of Contest at ¶ 12(b). Coleman confirmed in his responses to discovery that he includes in this allegation the absentee ballots found during the recount for Maplewood 6. Patterson Aff. at Ex. K.

The undisputed facts show that the chain of custody for the 177 absentee ballots from Maplewood 6 cannot be questioned. Moreover, the undisputed evidence also shows that in Maplewood 6, there were more voters (1,568) than ballots (1,564), not the other way around as Coleman alleges. *Id.* at 28:11-17. As such, Contestee Franken respectfully requests the Court grant his Conditional Motion for Partial Summary Judgment with respect to the 177 absentee ballots found and counted in Maplewood 6, and dismiss Coleman's claim regarding these ballots with prejudice.

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 demonstrate the existence of specific facts that create a genuine issue for trial. *See Gorath v. Rockwell Int'l, Inc.*, 441 N.W.2d 128, 131 (Minn. Ct. App. 1989), *review denied* (Minn. July 27, 1989). Indeed, 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).

A party cannot rely upon bare allegations or denials to oppose a summary judgment motion. *See Russ*, 566 N.W.2d at 71; *Mickelson v. Travelers Ins. Co.*, 491 N.W.2d 303, 306 (Minn. Ct. App. 1992) (party opposing summary judgment may not rely on general statements of fact or conclusory allegations, but must demonstrate the existence of specific facts that create an issue of material fact). “Evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party’s case to permit reasonable persons to draw different conclusions” is not sufficient to avoid summary judgment. *Id.* Rather, the non-moving party must come forward with relevant, persuasive evidence supporting the party’s claims or face entry of summary judgment. *See Bohdan v. Alltool Mfg. Co.*, 411 N.W.2d 902, 906 (Minn. Ct. App. 1987).

B. Clearly Established Law Required The Board to Adopt the Election Day Returns in Minneapolis Precinct 3-1

Long-standing precedent makes clear that, when missing ballots cannot be found, Election Day returns must be used to establish the vote totals. As the Minnesota Supreme Court has recognized, a ballot serves as the best evidence of a vote. *Moon v. Harris*, 142 N.W. 12, 14 (Minn. 1913). But when ballots are missing, or their integrity is otherwise compromised, election officials must turn to the next best evidence: here, the vote totals provided by election officials on Election Day. *Id.*; *see also Stemper v. Higgins*, 37 N.W. 95 (Minn. 1888) (recognizing that when ballots have not been properly safeguarded, other evidence should be used as indication of vote).

Quite simply, “while the ballots are original evidence, the official results are *prima facie* evidence of the votes cast. Where the original ballots cannot be deemed trustworthy, *or as here, are missing, the official results are the best evidence.*” *McDunn v. Williams*, 620 N.E.2d 385, 402 (Ill. 1993) (emphasis added). This principle is clearly established in both Minnesota and across the country—and has been for well over a century. *See, e.g., Newton v. Newell*, 6 N.W. 346, 347 (Minn. 1880) (“The ballots cast at an election may . . . be resorted to for the purpose of disputing the returns of the board of canvassers, and of investigating and ascertaining the actual state of the vote. *But to entitle them to be used for these purposes it must affirmatively appear that they have, in the language of section 18 of the election law, been “carefully preserved.”*) (emphasis added); *Sullivan v. Ebner*, 262 N.W. 574, 576 (Minn. 1935) (citing *Newton* and concluding that trial court was correct to reject recounted ballots as likely subjected to tampering); *see also Henderson v. Maley*, 806 P.2d 626 (Okla. 1991) (where there is reasonable doubt as to the integrity of the ballot boxes “no recount is had and the returns of the precinct officials prevail”); *Thoms v. Andersen*, 235 N.W.2d 898 (S.D. 1975) (holding that, where ballots were missing from recount, the court should have avoided disenfranchising more than 200 electors by using official canvass in place of ballots themselves).⁹

Common sense supports the conclusion reached by the overwhelming body of case law. A missing vote simply cannot be recounted; the original count stands. *See Jenkins v. Martin*, 154 S.W.2d 242 (Ky. 1941) (“If the ballots have been tampered with, naturally a recount in no way impeaches the original figures for the same thing is not counted.” (internal quotations omitted)). And an incorrect result indisputably will result if officials attempt to tally remaining votes as though the missing votes did not exist.

⁹ *See also* Memorandum in Support of Contestee's Motion to Dismiss (Jan. 12, 2009) at 23-25 & n.3 (citing numerous additional cases from states throughout the country).

The Minnesota district court case upon which Coleman primarily relied during the State Canvassing Proceedings is fully in accord with this well-established and common-sense principle. That case, *Purcell v. Sparks*, C5-02-1938 (Minn. Fifth Judicial District 2002), took a similar approach in a situation much more complicated than this one: both the original ballots and the official Election Day results were compromised. On Election Day evening, there were 17 more votes than voters. As a result, an election judge (with the apparent agreement of the opposing party's judge) burned 17 ballots in her fireplace, apparently without ever actually counting them.

The State Canvassing Board, on a 4-1 vote, decided to revert to the election night machine tape number for one candidate and to use the recount number for the other candidate. In this way, neither candidate was prejudiced by the ballot burning. The District Court held that the 17 intentionally destroyed ballots could not be counted for either party, because the choice of those 17 voters could not "be imputed, based on a probability, or an evidentiary penalty."

In this case, there is no indication that the official Election Day results were compromised, nor that local officials intentionally destroyed ballots. Here, the Election Day count and the Hennepin County canvass results are based on real ballots, not speculation or "probability" as to what might have been on burned ballots. Unlike the Mower County case, to ignore the machine count would reduce each candidate's vote, and disenfranchise more than one hundred voters.¹⁰

In a bizarre turn, the Coleman campaign attempted, before the State Canvassing Board, to distinguish the enormous volume of case law from Minnesota and other states on the theory that

¹⁰ The *Purcell* case, in any event, is an unpublished district court decision that, even notwithstanding its plainly distinguishable facts, carries little persuasive force and especially so in light of the contrary opinion of the Attorney General. The State Canvassing Board, which included no less than four active judges, including the Chief Justice, unanimously rejected Contestant's strained reading of *Purcell*. The argument is, with all due respect, no more persuasive in its second reiteration.

the Election Day count should be used only when *all* of the ballots have been lost. Both Reichert and the Board properly recognized that such a position is absurd and completely ignores the disenfranchised voters. By Coleman's reasoning, when 2,000 votes have been cast, and 1,999 ballots have been lost, the continued existence of a single ballot would require that the Board declare the winner to be the single voter's chosen candidate. Neither the overwhelming body of decisions from Minnesota and around the country nor, indeed, fundamental principles of justice, would support such a result.

The City, the Secretary of State, *and* the full Board rejected Contestant's curious argument. The City's factual determination and the Secretary of State and Board's reasoned interpretation of state law are entitled to deference from this Court. *See, e.g., Risdall v. Brown-Wilbert, Inc.*, 753 N.W.2d 723, 733 (Minn. 2008); *George A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988); *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn.1977).

That the Board had the authority and duty under state law to accept the Election Day return is confirmed by both the purpose and structure of the recount statute itself. Specifically, the recount is designed to determine “the number of votes validly cast for the office to be recounted.” Minn. Stat. § 204C.35, subd. 3. During the recount, local election officials recounted the votes cast in their precincts. *See* Minn. Stat. § 204C.35, subd. 1; Minn. R. §§ 8235.0600, 8235.0800.¹¹ In Minneapolis 3-1, however, a manual recount of the ballots was literally not possible because more than 130 ballots were unavailable for review and recounting. For the purpose of the recount, therefore, the Board properly accepted the Election Day return provided by Minneapolis 3-1 as reflecting the proper tally for the precinct, because those returns were the next-best evidence in the absence of the ballots themselves.

¹¹ *See also* Statewide Recount Assistance Plan, available at http://www.sos.state.mn.us/docs/statewide_recount_assistance_plan.pdf.

The statutes that set forth the Board's authority confirm this position. Those statutes provide that the Board must "canvass the certified copies of the county canvassing board reports received from the county auditors." Minn. Stat. § 204C.33, subd. 3. It "shall prepare a report" that states three things:

- (a) The number of individuals voting in the state and in each county;
- (b) The number of votes received by each of the candidates, specifying the counties in which they were cast; and
- (c) The number of votes counted for and against each constitutional amendment, specifying the counties in which they were cast.

Id. Finally, it "shall sign the report and certify its correctness." *Id.*; see also *McVeigh v. Spang*, 228 N.W. 155 (Minn. 1929) ("[T]he important function of the [canvassing] board is to canvass the vote and determine the number cast for each candidate. When they have done that and stated and declared the number of votes found cast for each candidate they have declared the result of the election.").

In the recount, the Board must consider "the ballots cast in the election." Minn. Stat. § 204C.35, subd. 3. Were the Board to rely on a manual recount of the ballots from Minneapolis 3-1—notwithstanding the more than 130 ballots that were erroneously misplaced and excluded—it would not be considering all of the ballots legally cast in that precinct. Instead, it would be signing and certifying the correctness of a report that cannot be correct. This is contrary to law. The missing ballots therefore precluded the Board from relying on the manual recount for Minneapolis 3-1. To fulfill its duties, the Board, when faced with missing ballots, must and did accept the Election Day return provided by Minneapolis 3-1 as reflecting the proper tally. So should this Court.

In sum, because there are no genuine issues as to any material facts regarding these ballots, and because Franken is entitled to judgment as a matter of law, this Court should grant his Conditional Motion for Partial Summary Judgment and dismiss Coleman's claims concerning the missing ballots from Minneapolis 3-1.

C. Well-Established Law Required the Opening and Counting of Absentee Ballots Inadvertently Left Uncounted on Election Day

By law, election judges in each precinct must take possession of absentee ballots delivered to them; examine the envelopes for those ballots to ensure compliance with four specific statutory requirements; mark as "Accepted" those envelopes meeting the statutory requirements; note the letters "A.B." next to the names of each individual whose returned absentee ballot has been marked "Accepted"; and open and count those ballots marked as "Accepted." Minn. Stat. § 203B.12.

Coleman urges the Court to disenfranchise 177 Minnesota absentee voters from Maplewood 6 because two election judges inadvertently failed to fulfill these requirements, forgetting to count lawfully cast ballots on Election Day. He takes this position even though there is no reasonable dispute that the 177 uncounted absentee ballots met the statutory requirements and even though there is no plausible question that, given the extensive security and chain of custody measures taken in Ramsey County, the ballots are reliable, and were accurately counted during the recount.

This result is contrary to well-settled Minnesota law that "the right of the elector to have his vote cast and counted is protected from fraud or mistake of the election officers by every possible safeguard, where it appears that his untrammelled right to this high privilege of citizenship has not been denied or abridged." *State v. Falk*, 89 Minn. 269, 275-76 (Minn. 1903) (citing McCrary on Elections, § 131). Voters simply may not be disenfranchised because of

irregularities, ignorance, or mistake on the part of election officials. *Fitzgerald v. Morlock*, 120 N.W.2d 339, 345 (Minn. 1963) (If a voter "complies with the law his right to vote cannot be defeated by reason of irregularities, ignorance, inadvertence, or mistake, or even intentional wrong on the part of the election officers."); *see also Taylor v. Taylor*, 10 Minn. 107 (1865) ("The rule of law has long been well settled that the failure of the officers of an election (as in this case) to perform their duties strictly as required by statute, does not invalidate the election."); *Edson v. Child*, 18 Minn. 64 (1871) (reaffirming the rule announced in *Taylor v. Taylor*); *Stemper v. Higgins*, 37 N.W. 95, 97-98 (Minn. 1888) ("This is a matter which concerns, not merely the contestants, but as well the people in their choice of public officers. So likely are defects to occur in election proceedings, and of so great importance is it that the real purposes of the election be not defeated by such common occurrences, that the courts have always been slow to declare an election ineffectual, unless the law departed from has been deemed to be of such a fundamental character that its non-observance might involve or lead to greater evils than the avoiding of a popular election."); *Soper v. Sibley Co.*, 48 N.W. 1112, 1112 (Minn. 1891) (holding, in part, that conduct alleged on part of election officials and election judges not in strict compliance with Minnesota election statutes, was not sufficient to sustain election contest). Indeed, even where a ballot does not meet all of the statutory requirements, mere technicalities or irregularities cannot be used to exclude absentee ballots. *In re Contest of School Dist.*, 431 N.W.2d 911 (Minn. App. 1988) ("As a general rule, as long as there is substantial compliance with the laws, and no showing of fraud or bad faith, the true result of an election should not be defeated by an innocent failure to comply strictly with the statute." (citing *Application of Andersen*, 119 N.W.2d 1, 8 (Minn. 1962); *Kerrigan v. Vetsch*, 71 N.W.2d 652, 658 (1955))).

In short, there is no good argument for disenfranchising the 177 voters whose votes were inadvertently missed on Election Day due to errors by the election judges, but properly counted as a part of the recount. There is no dispute as to any material fact, and Franken is entitled to judgment as a matter of law with respect to the Maplewood 6 voters.

CONCLUSION

For the foregoing reasons, Franken respectfully requests the Court grant his Conditional Motion for Partial Summary Judgment and dismiss Coleman's claims concerning the missing ballots from Minneapolis 3-1 and the previously uncounted absentee ballots from Maplewood 6.

Dated: January 21, 2009.

PERKINS COIE LLP

FREDRIKSON & BYRON, P.A.

Marc E. Elias (DC Bar #442007)
Kevin J. Hamilton (Wash. Bar #15648)
David J. Burman (Wash. Bar #10611)
607 Fourteenth Street, N.W., Suite 800
Washington, D.C. 2005-2011
Telephone: (202) 628-6600

By: David L. Lillehaug / cmf
David L. Lillehaug (#63186)
200 South Sixth Street, Suite 4000
Minneapolis, Minnesota 55402
Telephone: (612) 492-7000

Admitted Pro Hac Vice

Attorneys for Contestee Al Franken

ACKNOWLEDGMENT

Applicants acknowledge that sanctions may be imposed under Minn. Stat. § 549.211.

David L. Lillehaug / cmf

4496351