

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.,

Petitioners,

Supreme Court File No. A09-65

vs.

**ORDER ON INTERVENOR'S RULE  
60.02 MOTION TO VACATE  
JUDGMENT**

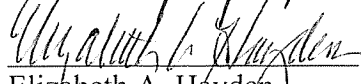
Mark Ritchie, Minnesota Secretary of State, et. al.,

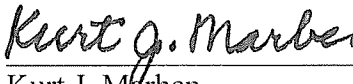
Respondents.

This matter comes before the Court on "Contestants' Notice of Motion and Rule 60.02  
Motion to Vacate 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. Intervenor's Rule 60.02 Motion to Vacate Judgment is granted in part and denied in part.
2. That Portion of the Court's February 10<sup>th</sup> Order granting summary judgment to  
Petitioners Hannah Gorski, Donna Mortenson and Audrey Verlo 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: 3/2/09

  
Elizabeth A. Hayden  
Judge, District Court

  
Kurt J. Marben  
Judge, District Court

  
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.

On February 25, Intervenor Norm Coleman ("Intervenor") filed a Rule 60.02 motion seeking to vacate this Court's February 10<sup>th</sup> Order.<sup>1</sup> On February 26, Petitioners filed papers in opposition to Intervenor's motion. The Court heard argument on the motion on February 27.

### **II. The Grant of Summary Judgment to Petitioners Falde, Quinlan, Quinlan, and Quinn is Consistent with State Law**

Intervenor argues that the Court erred in granting summary judgment to seven Petitioners. Specifically, Intervenor argues that the grant of summary judgment is inconsistent with the Court's February 13<sup>th</sup> Order in the election contest. In its February 13<sup>th</sup> Order, the Court ruled that certain types of absentee ballots would not be opened and counted because they failed to comply with all applicable requirements of state law.

Intervenor argues that the Court's grant of summary judgment to Petitioners Kim Falde, Charles P. Quinn, Leona Quinlan, and Thomas Quinlan are not legally cast under relevant law and should not be opened and counted. A complete voter's certificate on an absentee ballot

---

<sup>1</sup> Intervenor purported to file the motion on behalf of Contestants in the election contest before this Court in Court File No. 62-CV-09-56. However, Contestants are not parties to the § 204B.44 proceedings brought by Petitioner in Supreme Court File No. A09-65. Intervenor is a party to the § 204B.44 proceedings pursuant to a motion to intervene granted by the Supreme Court.

return envelope is required under Minnesota law. Minn. Stat. § 203B.12, subd. 2. The one exception to this requirement was specifically set forth in this Court's February 10<sup>th</sup> Order:

[i]f a voter hand delivers an absentee ballot return envelope, “the county auditor or municipal clerk shall inspect the envelope to verify that it is sealed and that the absentee voter’s certificate is properly completed.” Minn. R. 8210.2200, subp. 2. In addition, this Rule goes on to provide that “[w]hen an absent voter hand delivers an envelope which is unsealed or has an improperly completed absentee voter’s certificate, the absent voter shall be allowed to seal the envelope and correct or complete the certificate.”

(Order Feb. 10 at 8 (emphasis added).) Under this Rule, an absentee ballot return envelope may be accepted for opening and counting, even without a complete voter’s certification, if the envelope was hand-delivered and accepted by local election officials without providing the voter the opportunity to correct the certification as required by the Rule. Nothing in the Court’s February 13<sup>th</sup> Order was meant to amend the February 10<sup>th</sup> Order, wherein the Court specifically applied this Rule to certain Petitioners. Insofar as the Orders may seem to be conflicting, the Court now specifically holds that it shall not order the opening of any absentee ballot return envelope that was not signed by the voter without evidence that the absentee ballot return envelope was hand-delivered and accepted by local election officials who failed to provide the voter with the opportunity to complete the certification as required by Rule 8210.2200, subp. 2.<sup>2</sup>

In light of the foregoing, the Court denies Intervenor’s motion to vacate summary judgment granted to the following Petitioners who provided un rebutted evidence that they hand-delivered their absentee ballot return envelopes to local election officials who failed to provide them with the opportunity to complete the voter certification as required by Rule 8210.2200, subp. 2:

---

<sup>2</sup> The Court notes that this Rule is well-known to all parties in these proceedings and was first cited in these proceedings by Petitioners in their memorandum in support of their motion for summary judgment filed on January 21, 2009.

- Kim Falde of Dakota County (*see* Nauen Aff. Ex. 12-A (absentee ballot return envelope witnessed by election official of Apple Valley) & 12-D at ¶ 5 (“I returned my completed ballot, enclosed in the secrecy envelope and the return envelope, to the city election official who had provided the ballot to me. The city election official completed the witness section on the return envelope. The city election official did not inform me that I was required to sign the certification on the absentee ballot return envelope. I relied upon the city election official to bring any errors and omissions on the certificate to my attention.”).)
- Leona Quinlan of Dakota County (*see* Nauen Aff. Ex. 17-A (absentee ballot return envelope witnessed by election official of Dakota County) & 17-B at ¶ 3 (“When we came back, the city official must have given us the wrong return envelopes to sign. The same city official witnessed both my husband’s and my genuine signatures.”).)
- Thomas Quinlan of Dakota County (*see* Nauen Aff. Ex. 18-A (absentee ballot return envelope witnessed by election official of Dakota County) & 18-B at ¶ 3 (“When we came back, the city official must have given us the wrong return envelopes to sign. The same city official witnessed both my husband’s and my genuine signatures.”).)
- Charles P. Quinn of Dakota County (*see* Nauen Aff. Ex. 19-A (absentee ballot return envelope witnessed by election official of Apple Valley) & 19-B at ¶ 5 (“I returned my completed ballot, enclosed in the secrecy envelope and the return envelope, to the city election official who had provided the ballot to me. The city election official completed the witness section on the return envelope. The city election official did not inform me that I was required to sign the certification on the absentee ballot return envelope. I relied upon the city election official to bring any errors or omissions on the certificate to my attention.”).)

In applying Rule 8210.2200, the Court does not hold that any error by local election officials in accepting an incomplete absentee ballot return envelope negates a voter’s failure to adhere to applicable requirements. The Court is merely enforcing the plain terms of a Rule governing elections in Minnesota as expressly discussed in the Court’s Order of February 10.

### **III. The Grant of Summary Judgment to Petitioner McCool is Consistent with State Law**

Intervenor argues that this Court erred in granting summary judgment to Petitioner Greg McCool in its February 10<sup>th</sup> Order. The undisputed evidence before this Court shows that Mr. McCool complied with all relevant provisions of state law in submitting his absentee ballot. He

provided evidence that he signed an absentee ballot application and that he “applied under my correct name and address.” (Nauen Aff. Ex. 34-C.) However, affixed to the absentee ballot return envelope provided to him by Ramsey County was a label setting forth his correct address but misspelling his last name as “Mc Curl.” (*Id.* Ex. 34-A.) Intervenor argues that Petitioner McCool should have corrected this official error. The Court rejects this argument; the instructions provided to Petitioner imposed no duty upon him to confirm that local election officials correctly spelled his name on the label affixed to his absentee ballot return envelope. *See* Minn. R. 8210.0500, subp. 2 (“Step 6. Print your name and address on the back of the ballot return envelope unless a label with your name and address has already been affixed.”). Given the un rebutted evidence that Petitioner McCool applied for an absentee ballot under his correct name, the Court determines that the spelling error is that of local election officials and need not have been corrected by McCool in order for his vote to be legally cast.<sup>3</sup>

#### **IV. The Grant of Summary Judgment to Petitioners Gorski, Mortenson and Verlo is Vacated**

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

In its February 10<sup>th</sup> Order, the Court granted summary judgment to Petitioner Hannah Gorski. (Order of Feb. 10 at 9.) In support of her motion for summary judgment, Petitioner Gorski submitted an affidavit in which she stated that she “signed and submitted an application for an absentee ballot.” (Nauen Aff. Ex. 30-B at ¶ 4.) The Court granted summary judgment based upon the un rebutted evidence, including Petitioner Gorski’s affidavit. The Court has since learned that she did not sign her absentee ballot application. (Supp. Nauen Aff. Ex. 20-A ¶ 6.)

---

<sup>3</sup> This ruling does not contradict the Court’s determination that an absentee ballot return envelope with an incomplete certification where the certification is covered, in whole or in part, by a label placed by election officials is not legally cast. As explained in the Court’s Order of February 13<sup>th</sup>, the instructions to absentee voters specifically direct voters to sign the absentee ballot return envelope. *See* Minn. R. 8210.0500, subp. 2 (Step 6). As explained above, voters returning absentee ballot return envelopes in-person to election officials with incomplete certifications must be given the opportunity to complete their certification. *See* Minn. R. 8210.2200. Failure to provide them such an opportunity is official error.

Given this evidence, the Court vacates the grant of summary judgment to Petitioner Gorski because she failed to sign her absentee ballot application and, thus, her ballot was not legally cast in accordance with state law. *See* Minn. Stat. § 203B.12, subd.2(2).

**b. Petitioners Mortenson and Verlo Failed to Update Their Voter Registration as Required by Minnesota Law**

Intervenor argues that the grant of summary judgment to Petitioners Donna Mortenson and Audrey Verlo was in error because these two voters failed to update their voter registration records when they moved within their precincts. 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.

The undisputed evidence before the Court shows that Petitioner Verlo changed units within the same apartment complex but did not update her voter-registration record prior to the November 4, 2008 election. (Nauen Aff. Ex. 39-C (“In January 2007 I switched apartment units from number 712 to number 123. Both units are in the same apartment complex and have the same street address.”) & Ex. 39-B (showing the residence address for Petitioner Verlo in the statewide voter registration system to be at unit 712 rather than unit 123).) Given this evidence, this Court now vacates the grant of summary judgment to Petitioner Verlo because she had failed to update her residential address as required by Rule 8200.3600 and, thus, was not properly registered to vote at the time of the November 4, 2008 election.

Similarly, the undisputed evidence shows that Petitioner Donna Mortenson changed units within the same apartment complex but did not update her voter-registration record prior to November 4, 2008 election. (Nauen Aff. Ex. 47-C) (“This is the same address that I used when I

registered to vote, except that I had changed apartment units within the same complex, moving from unit number 53 to 34.”) & 47-B (showing the residence address for Petitioner Mortenson in the statewide voter registration system to be at unit 53 rather than unit 34).) Given this evidence, this Court now vacates the grant of summary judgment to Petitioner Mortenson because she had failed to update her residential address as required by Rule 8200.3600 and, thus, was not properly registered to vote at the time of the November 4, 2008 election.

**V. The Court’s Grant of Summary Judgment to Other Petitioners was Proper**

In addition to attacking the grant of summary judgment to certain Petitioners as outlined above, Intervenor argues that the grant of summary judgment to any Petitioners is improper because of the trial proceeding before the Court in the election contest at issue in Court File No. 62-CV-09-56. Intervenor argues that it was improper for the Court to consider affidavits and declarations in lieu of requiring trial testimony from the individual Petitioners. Intervenor’s argument conflates the two proceedings. Petitioners are not parties to the election contest; no trial testimony has been taken in the § 204B.44 proceeding. Intervenor had the opportunity to oppose the evidentiary basis supporting Petitioners’ motion for summary judgment when it was filed on January 21, 2009. He cannot now be heard to complain about the strategic choices he made during the course of litigation. The Court refuses to wholly vacate the grant of summary judgment to Petitioners on February 10, 2009.

**VI. Conclusion**

For the reasons set forth above, the Court grants in part and denies in part Intervenor’s Rule 60.02 motion to vacate. The Court vacates its grant of summary judgment to Petitioners Hannah Gorski, Donna Mortenson and Audrey Verlo. The Court does not vacate any other portion of its February 10<sup>th</sup> Order.