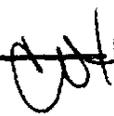


FILED
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By  Deputy

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STATE OF MINNESOTA
COUNTY OF RAMSEY

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,

Court File No. 62-CV-09-56

Cullen Sheehan and Norm Coleman,

Contestants,

**CONTESTANTS' MEMORANDUM OF
LAW IN SUPPORT OF RULE 60.02
MOTION TO VACATE JUDGMENT**

v.

Al Franken,

Contestee.

INTRODUCTION

The provisions of Minnesota Rule of Civil Procedure 60.02 allow relief from a final judgment. While rarely used, the law recognizes that under certain circumstances, it is appropriate to grant relief from an otherwise final judgment because the basis for that judgment no longer exists. This is one of those unique occasions.

On February 10, 2009, this Court granted summary judgment to 23 of the 64 absentee voters represented by Mr. Nauen ("Nauen voters") and ordered the absentee ballots of those 23 voters opened and counted as legally cast votes. Contestants did not oppose the Nauen voters' motion for summary judgment, so long as the Contest Court treated all similarly situated ballots in the same manner. Three days later, on February 13, 2009, this Court ruled as a matter of law that ballots in ten different categories are not legally cast and could not be opened and counted. Memorandum Op.

at 10. Seven of the 23 ballots on which the Court granted summary judgment on February 10, do not comply with the standard articulated by this Court on February 13, 2009:

- Kim Falde and Charles P. Quinn—neither of them signed their voter certification as required by the February 13, 2009 Order;
- Mr. and Mrs. Quinlan—each signed the other’s ballot envelope and therefore neither completed the certification properly as required by the February 13, 2009 Order;
- Greg McCool—the name on his certification was different than that on his application in contravention of the February 13, 2009 Order;
- Audrey Verlo—her address does not match that at which she was registered and was sent new registration materials in contravention of the February 13, 2009 Order;
- Donna Mortenson—the address on her certification does not match that she says was on her absentee ballot application, her certification is not dated, her witness did not date her signature, and she is not registered at the address reflected on the ballot envelope in contravention of the February 13, 2009 Order.

January 21, 2009 Affidavit of Charles Nauen.

In addition to these seven ballots, Contestants recently learned that the absentee ballot of Hannah Gorski, which the Court ordered opened and counted on February 10, 2009, did not meet all of the criteria set forth in the Court’s February 13, 2009 Order and was based on incorrect information submitted in their original affidavits. Nauen Mem. of Law February 20, 2009 at 15-16. Ms. Gorski did not sign and complete her absentee ballot application; rather, her mother signed the application.

These eight ballots which the Court ordered opened and counted cannot be squared with the Court's subsequent ruling on February 13, 2009 requiring strict compliance with the statutory mandates before absentee ballots will be opened and counted. It is no longer equitable to enforce a judgment because the basis for that judgment has disappeared. It is, however, still possible to correct this error and thus put all similarly situated absentee voters in the same position. Contestants request that this Court vacate its prior summary judgment ruling and consistently apply the standard set forth in its February 13, 2009 Order to the absentee ballots of the Nauen voters.

ARGUMENT

A. LEGAL STANDARD.

Pursuant to Rule 60.02, a party is entitled to relief from a judgment if it establishes (1) a reasonable claim on the merits; (2) a reasonable excuse for the failure to act; (3) action with due diligence after entry of judgment; and (4) lack of prejudice to the opposing party. *Reid v. Strodtman*, 631 N.W.2d 414 (Minn. Ct. App. 2001).

Contestants meet all of these criteria. Contestants have a reasonable claim on the merits. This Court's February 13, 2009 decision changed the answer to the only question at issue—whether the 64 Nauen voters' ballots are legally cast votes. Contestants have promptly sought relief under this rule once the Court issued its subsequent February 13, 2009 Order and Contestants learned of the inaccuracies in the Gorski Affidavit. Finally, Contestants motion will not cause any prejudice to the Contestee, other than the obvious fact that those illegally cast votes which are now being counted will be removed from the final vote tally.

Contestants also respectfully request that this Court vacate its entire February 10, 2009 Order with respect to the remaining Nauen voters to which the court granted summary judgment. The Court granted summary judgment based solely on the affidavits of individual voters and did so without live testimony from those witnesses despite the fact that a trial is ongoing before the Contest Court. Given the problems with at least one of those affidavits and apparent inconsistencies in at least some of the underlying documents (such as registration information that is incomplete and other signatures that appear more dissimilar than similar), Contestants believe the ability to cross examine the affiants or absentee voters has become critical. *Woods v. Robb*, 171 F.2d 539, 541 (5th Cir. 1948) (trial is best test of rights of movant).

CONCLUSION

For all of the foregoing reasons, Contestants respectfully request this Court vacate its February 10, 2009 Order in its entirety or, in the alternative, with respect to at least the eight voters discussed above.

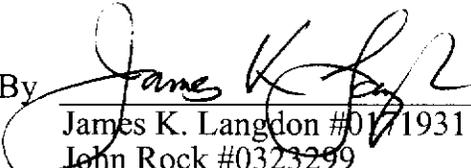
Dated: February 25, 2009

Respectfully submitted,

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