

MAR 05 2009

FILED

STATE OF MINNESOTA
IN SUPREME COURT

No. A09-345

Harold Shad, et al.,

Petitioners,

v.

Mark Ritchie, Minnesota Secretary of State,
Cass County, Dakota County, Hennepin
County, Pope County, Ramsey County,
Sherburne County, St. Louis County,
Wabasha County,

Respondents.

MOTION OF NORM COLEMAN TO INTERVENE

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Attorneys for Norm Coleman

Pursuant to Minn. R. Civ. App. P. 127, Norm Coleman (“Coleman”) respectfully moves this Court for leave to intervene in this action. Petitioners ask this Court to resolve a question, whether Petitioners’ absentee ballots were properly rejected, which it already expressly determined is best left to a statutorily-prescribed election contest where evidence may be both gathered and presented. Coleman initiated such a contest on January 6, 2009, and seeks intervention now in order to protect his interest in the fair and accurate resolution of the November 4, 2008 election.

1. Candidates and related parties should be permitted to intervene in proceedings such as that brought by Petitioners. See, e.g., Erlandson v. Kiffmeyer, 659 N.W.2d 724, 726 (Minn. 2003); Studer v. Kiffmeyer, 712 N.W.2d 552, 554 n.3 (Minn. 2006).

2. Coleman has an interest in the relief sought in this proceeding, specifically, that the Court order that absentee ballots, cast in the November 4, 2008 general election and purportedly wrongly rejected, be opened and counted. Coleman is the incumbent candidate for the office of United States Senator for the State of Minnesota.

3. Coleman is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect his interests. Indeed, the petition threatens to undermine the contest action already underway and in which this Court has indicated claims of this nature belong.

4. Coleman’s claims and defenses have a common question of law and fact with those in this action.

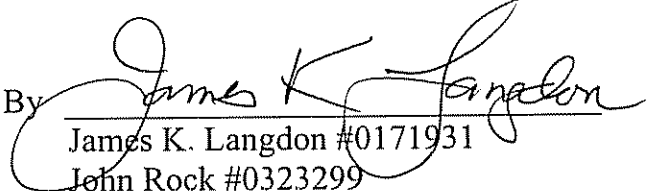
5. Intervention will not unduly delay or prejudice the adjudication of the rights of the original parties and will in fact help to ensure that the election is fairly resolved and that all ballots properly cast are counted.

6. Coleman has filed this application in a timely manner.

Dated: March 5, 2009

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v.

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Cass County, Dakota County, Hennepin
County, Pope County, Ramsey County,
Sherburne County, St. Louis County,
Wabasha County,

Respondents.

MEMORANDUM OF INTERVENOR NORM COLEMAN
REGARDING TIMELINESS OF THE PETITION

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INTRODUCTION

As the Court recognized in its Order, Minn. Stat. §§ 209.021, subd. 1, and 204C.35, subd. 1(d) (2008), require a notice of election contest be filed within seven days after the certification of the recount results by the canvassing board. The relief sought by Petitioners, though styled as an action under Minn. Stat. § 204B.44, is in the nature of a contest and accordingly should be subject to the time requirements governing such actions. Neither law nor equity requires this Court to accept contest claims brought after the statutory period for asserting them has expired.

ARGUMENT

I. THE PETITION IS UNTIMELY UNDER MINN. STAT. §§ 209.021 AND 204C.35.

Minn. Stat. § 209.021, subd. 1, provides that, in the case of a general election, a notice of contest must be served “within seven days after the canvass is completed.” The seven-day statute of limitations begins to run “upon certification of the results of the recount by the canvassing board.” Minn. Stat. § 204C.35, subd. 1(d). Because Petitioners failed to file their petition within seven days of the January 5, 2009 certification, their petition is untimely and cannot be entertained by the Court.

The Court has repeatedly acknowledged that “[t]he authority of courts to entertain election contests is purely statutory.” Derus v. Higgins, 555 N.W.2d 515, 516 n.1 (Minn. 1996) (quoting Phillips v. Ericson, 80 N.W.2d 513, 517 (Minn. 1957)). As a result, Contestants must fully comply with the statutory procedural requirements when filing their challenge. “[T]he provisions of the statute relating to filing and serving of the

notice must be strictly followed.” Rachner v. Growe, 400 N.W.2d. 749, 751 (Minn. Ct. App. 1987) (quoting Petrafeso v. McFarlin, 207 N.W.2d 343, 345 (Minn. 1973)); see also Lebens v. Harbeck, 243 N.W.2d 128, 129 (Minn. 1976) (affirming the dismissal of an election contest for failure to file notice within seven days as required by statute); Powell v. Johnson, 231 N.W.2d 926, 927 (Minn. 1975) (same).

Although § 204B.44 itself does not purport to contain any time limitation, a strict limitation is necessary for the timely resolution of the election contest. As the Court has recognized:

The very nature of matters implicating election laws and proceedings routinely requires expeditious consideration and disposition by courts facing considerable time constraints. . . . As a result, we have examined applications for relief not only on their merits, but also from the perspective of whether the applicant acted promptly in initiating proceedings.

Peterson v. Stafford, 490 N.W.2d 418, 419 (Minn. 1992).

Petitioners’ claims are appropriate subject matter for an election contest—a remedy Petitioners could have invoked. Indeed, the Court reached that conclusion when it referred a nearly identical petition to the contest court. In its January 16, 2009 Order, the Court stated:

The relief sought in the petition requires a determination whether the absentee ballot submitted by each petitioner complied with the legal requirements for such ballots and was therefore improperly rejected by local election officials. Judicial efficiency and the interests of justice will be better served if the claims presented in this matter are addressed by the three-judge district court panel in the election contest. . . .

The Court has applied the same strict timing limitations when an individual voter petitioned the Court in a contested election. See, e.g., Savior v. Ventura, 1999 Minn.

LEXIS 217, at *5 (Minn. 1999) (holding that a voter's challenge not filed by the statutory deadline "must be dismissed as untimely.").

Petitioners here did not act promptly in initiating the proceedings. Although represented by the same counsel as those voters who petitioned the Court on January 13, 2009, they waited nearly five weeks beyond the time period for a contest filing. The petition accordingly should be dismissed as untimely.

II. THE PETITION IS BARRED BY LACHES.

Petitioners' request for relief is in any event barred by laches. Laches is applied in order to "prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay." Piepho v. Bruns, 652 N.W.2d 40, 43 (Minn. 2002).

The contest is now in its sixth week. Were Petitioners' claims to be referred to the contest court, they would delay the proceedings and unduly burden the contest court, which has already indicated its concern regarding late-filed claims and the need for a timely resolution of the action.¹ See February 6, 2009 Order (attached as Appendix A).

¹ The cases cited by Petitioners to support their argument against the application of laches are fundamentally different from the present case. Each of the cases involved pre-election challenges made to the content or form of ballots; in none of the cases was an election contest underway. See Melendez v. O'Connor, 654 N.W.2d 114 (Minn. 2002) (petition to remove state legislative candidate from ballot); Peterson v. Stafford, 490 N.W.2d 418 (Minn. 1992) (pre-election petition challenging the form of judicial election ballots); Moe v. Alsop, 180 N.W.2d 255 (Minn. 1970) (petition challenging the placement of a candidate on a primary election ballot); Breza v. Kiffmeyer, 723 N.W.2d 633 (Minn. 2006) (pre-election challenge of a proposed ballot question); Winters v. Kiffmeyer, 650 N.W.2d 167 (Minn. 2002) (petition to have candidate name included on ballot for judicial office).

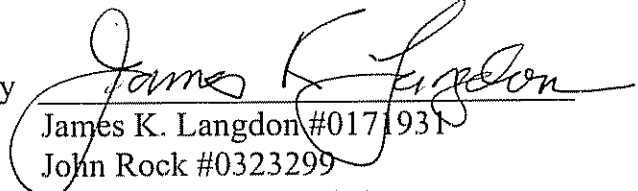
CONCLUSION

For the foregoing reasons, Intervenor Norm Coleman respectfully requests that the Court dismiss the petition as untimely.

Dated: March 5, 2009

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Appendix A

106.

FILED
Court Administrator

STATE OF MINNESOTA
COUNTY OF RAMSEY

FEB 6 - 2009

DISTRICT COURT
SECOND JUDICIAL DISTRICT

By LVC Deputy

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,

**ORDER ON MOTION FOR LEAVE
TO INTERVENE**

Contestants,

vs.

Al Franken,

Contestees,

The above-entitled matter came on for hearing before the Court on January 30, 2009,
upon motion for leave to intervene in this election contest filed by seven voters. Appearances
were noted for the record. The Court having heard and read the arguments of counsel, and based
upon the files, records, and proceedings herein, makes the following:

ORDER

1. The Motion for Leave to Intervene is DENIED.
2. Any other relief not specifically ordered herein is DENIED.
3. The attached Memorandum is incorporated as if fully set forth herein

Dated: February 6, 2009

Elizabeth A. Hayden
Elizabeth A. Hayden
Judge, District Court

Dated: 2/6/09

Kurt J. Marben
Kurt J. Marben
Judge, District Court

Dated: 2/6/09

Denise D. Reilly
Denise D. Reilly
Judge, District Court

MEMORANDUM

Before the Court is a request to intervene in the election contest begun by Contestants on January 6, 2009 brought by seven voters¹ who cast absentee ballots in the November 4, 2008 general election for United States Senator from Minnesota. These voters filed their Notice of Intervention in this election contest on January 21, 2009 seeking to intervene under Minnesota Rule of Civil Procedure 24.01 and 24.02. On January 30, 2009, Contestee filed an opposition to the intervention of the seven voters. The voters have now moved this Court for an order granting leave to intervene in this election contest.

Chapter 209 of the Minnesota Statutes, which imposes a strict and expedited timeline for filing an election contest, governs election contests in Minnesota. Section 209.02 specifically provides that an election contest must be filed “in the manner provided in this chapter.” Minn. Stat. § 209.02. Section 209.021 goes on to provide that “[n]otice [of election contest] must be served and filed . . . within seven days after the canvass is completed in the case of a special or general election.” Minn. Stat. § 209.021 (emphasis added); *see also* Minn. Stat. § 209.065 (requiring trial in an election contest to begin 20 days from the date of the filing of the Notice of Contest). The strict time limits in Chapter 209 are in line with Minnesota’s “strong public policy in favor of finality in elections.” *McNamara v. Office of Strategic & Long Range Planning*, 628 N.W.2d 620, 631 (Minn. Ct. App. 2001) (citing *Greenly v. Indep. Sch. Dist. No. 316*, 395 N.W.2d 86, 91 (Minn. Court. App. 1986)). These statutory and policy principles compel this Court to deny the voters’ request to intervene in this election contest.

By seeking to intervene in this election contest, the seven voters seek to avoid the strict deadline imposed by § 209.021 and be permitted to join an ongoing election contest even though

¹ The voters moving for leave to intervene in this matter are Paul Happe, Eugene C. Markman, Sharon Cook, Joel Gregory Uldrych, Claudia Bernstein, Michael J. Hall and Sehwah Maggie Philips.

they were statutorily barred from bringing such a contest themselves at the time they sought to intervene. Minn. Stat. § 209.021 (requiring a notice of contest to be filed within 7 days of the completion of the canvass). The Court refuses to permit these voters to ignore the statutory mandate for an expedited election contest process by filing a notice of intervention after the deadline for beginning an election contest has passed. While the Minnesota Rules of Civil Procedure generally permit parties to intervene in ongoing actions by filing a Notice of Intervention, the Court determines that applying this general intervention rule is not practicable to the present election contest proceeding. *See* Minn. Stat. § 209.065 (recognizing that the Rules of Civil Procedure apply to election contests only insofar as practicable), Minn. R. Civ. P. 81.01 & App. A (recognizing that the Rules of Civil Procedure do not govern pleadings, practice and procedure in proceedings identified in Appendix A, including election contest proceedings under Chapter 209). Accordingly, the Court will not permit these voters to circumvent the timeline imposed by § 209.021 through intervention under the Rules of Civil Procedure. The Court believes that this determination is necessary to ensure that this proceeding is not unnecessarily elongated from serial interventions by voters who failed to timely file an election contest in accordance with the requirements of Chapter 209.

The Court notes that other provisions of Minnesota Election Law provide a procedure for the seven voters to protect their right to suffrage. Specifically, the Court notes that these voters could file a petition for correcting errors and omissions in the conduct of the election pursuant to Minnesota Statute § 204B.44, which provides:

Any individual may file a petition in the manner provided in this section for the correction of any of the following errors, omissions, or wrongful acts which have occurred or are about to occur:

- (a) an error or omission in the placement or printing of the name or description of any candidate or any question on any official ballot;

- (b) any other error in preparing or printing any official ballot;
- (c) failure of the chair or secretary of the proper committee of a major political party to execute or file a certificate of nomination;
- (d) any wrongful act, omission, or error of any election judge, municipal clerk, county auditor, canvassing board or any of its members, the secretary of state, or any other individual charged with any duty concerning an election.

The petition shall describe the error, omission, or wrongful act and the correction sought by the petitioner. The petition shall be filed with any judge of the Supreme Court in the case of an election for state or federal office

Minn. Stat. § 204B.44. The Court notes that this process has already been invoked by other voters in the November 4, 2008 general election for United States Senator who filed a Petition under § 204B.44 with the Supreme Court on January 13, 2009. This Petition was subsequently referred to this Court for consideration and decision within this election contest. The Court notes that the procedure under § 204B.44 remains open and available to the seven voters who seek to intervene in this election contest.