

**FILED**

**AUG 17 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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**IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON**

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CINDY ZAPOTOCKY,	)	DIVISION THREE
Chairman, Spokane County	)	
Republican Party.	)	
Appellant,	)	
	)	<b>Case No.: 298752</b>
v.	)	
	)	
VICKY M. DALTON,	)	
Spokane County Auditor,	)	
	)	<b>BRIEF OF APPELLANT</b>
Respondents.	)	
	)	

---

Counsel for Appellant:

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2	224, 103 P.3d 725 (2004)	
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**A. ASSIGNMENTS OF ERROR**

General Standard of Review: The appellate court's role is to engage in the same inquiry as the trial court. A summary judgment motion brought under CR 56(c) can be granted only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. The court must consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits considered at face value. After the moving party has submitted adequate affidavits, the burden shifts to the nonmoving party to set forth specific facts sufficiently rebutting the moving party's contentions and disclosing the existence of a material issue of fact. The court should grant the motion only if, from all the evidence, reasonable persons could reach but one conclusion. *Wilson v. Steinbach*, 98 Wash. 2d 434, 437, 656 P.2d 1030 (1982), and *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wash. 2d 1, 12-13, 721 P.2d 1 (1986).



1           “As a general rule, the use of the word “shall” is imperative and  
2 operates to create a duty.” *Ballasiotes v. Gardner*, 97 Wash.2d 191, 195,  
3 642 P.2d 397, 399 (Wash. 1982), citing *State Liquor Control Bd. v. State*  
4 *Personnel Bd.*, 88 Wash.2d 368, 377, 561 P.2d 195 (1977).  
5

6           **Issue Pertaining to Second Assignment of Error**  
7

8           Does the Respondent have discretion to refuse to recount the  
9 ballots as requested by Petitioner?  
10

11           Standard of Review: “When a ballot is sufficiently plain to gather  
12 therefrom a part of the voter’s intention, it shall be the duty of the judges  
13 of the election to count such part.” *Robeson v. Clark*, 28 Wash.2d 276, 182  
14 P.2d 68 (1947). “As a general rule, the use of the word “shall” is  
15 imperative and operates to create a duty.” *Ballasiotes v. Gardner*, 97  
16 Wash.2d 191, 195, 642 P.2d 397, 399 (Wash. 1982), citing *State Liquor*  
17 *Control Bd. v. State Personnel Bd.*, 88 Wash.2d 368, 377, 561 P.2d 195  
18 (1977).  
19  
20  
21

22           Although a county canvassing board has discretion to recanvass  
23 ballots in certain circumstances,” *Wash. State Republican Party v. King*  
24 *County*, 153 Wash.2d 220, 224, 103 P.3d 725 (2004), without express  
25  
26

1 statutory authority, the Auditor does not have discretion to refuse to  
2 recount as requested under the statute.  
3

4 **Issue Pertaining to Third Assignment of Error**

5 Does the Petitioner have another plain, speedy, remedy at law?

6 Standard of Review:  
7

8 RCW 29A.64.011 – 29A.64.100 – Recounts; WAC 434-264-070  
9 requiring the Auditor to compare paper records with electronic results; and  
10 WAC 434-264-090 allowing for ballots to be sorted by batch.  
11

12 **Issue Pertaining to Fourth Assignment of Error**

13 Was Petitioner a “beneficially interested person” for purposes of  
14 seeking an Alternative Writ of Mandamus to require Respondent to  
15 perform a partial recount?  
16

17 Standard of Review:  
18

19 “Voters have sufficient interest to bring an action for mandamus in  
20 a case involving an election.” *In Re Recall of West*, 156 Wash.2d 244, 249,  
21 126 P.3d 798 (Wash. 2006), citing *State v. Mason*, 45 Wash. 234, 234, 88  
22 P. 126 (Wash 1907), citing *State ex rel. v. Tanzey*, 49 Ohio St. 656, 32  
23 N.E. 750; *Clay v. Ballard*, 87 Va. Common Council, 77 N.Y. 503, 33 Am.  
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1 Rep. 659; *Moses v. Kearney*, 31 Ark. 261; *State v. Gracey*, 11 Nev. 223;  
2 *City of Ottawa v. People ex rel.*, 48 Ill. 233.  
3

4 A beneficially interest party has been interpreted consistently with  
5 the rules of standing. *Vovos v. Grant*, 87 Wash.2d 697, 699-700, 555 P.2d  
6 1343 (1976). A party generally has standing to raise an issue if he has “a  
7 distinct and personal interest in the issue.” *Paris American Corp. v.*  
8 *McCausland*, 52 Wash.App. 434, 438, 759 P.2d 1210 (1988).  
9  
10

11 In deciding whether a plaintiff has standing, courts have looked  
12 at whether the plaintiff has a special or peculiar interest which has been  
13 aggrieved any differently in kind or degree than what is experienced by the  
14 general public. *Ocean Spray Cranberries, Inc. v. Doyle*, 81 Wn.2d 146,  
15 154, 500 P.2d 79 (1972); *State ex rel. Gebhardt v. Superior Court*, 15  
16 Wn.2d 673, 680, 131 P.2d 943 (1942).  
17  
18

19 The party’s injury must be one that “fairly can be traced to the  
20 challenged action” and “is likely to be redressed by a favorable decision.”  
21 *Valley Forge Christian College v. Americans United for Separation of*  
22 *Church & State, Inc.*, 434 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700  
23 (1982).  
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**Issue Pertaining to Fifth Assignment of Error**

Did the Court err in granting summary judgment and dismissing the petition for a writ of mandate?

Standard of Review:

*Wilson v. Steinbach*, 98 Wash. 2d 434, 437, 656 P.2d 1030 (1982), and *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wash. 2d 1, 12-13, 721 P.2d 1 (1986).



1 Petitioner, and set forth a case schedule that provided for the filing of an  
2 amended affidavit by Petitioner, the filing of responsive materials and  
3 other dispositive motions including a motion for summary judgment by  
4 February 10, 2011, and a case schedule concerning the hearing of the  
5 summary judgment motion.  
6  
7

8 Respondent then brought a motion to dismiss on summary  
9 judgment on February 17, 2011. (CP, pgs. 48-71, Respondent's Motion  
10 for Summary Judgment and Memorandum in Support). The court, hearing  
11 oral argument on April 20, 2011, granted Respondent's motion, and  
12 dismissed the case with prejudice. (CP, pgs. 87-90). Petitioner then  
13 brought this appeal on April 22, 2011.  
14  
15

## 16 2. Statement of Applicable Facts

17

18 The following facts are supported by the record to date, referenced  
19 RCWs, WACs, and Affidavits and Exhibits in the Clerk's Papers (CP).  
20

21 Spokane County's Canvassing Board is comprised of the Auditor,  
22 Prosecuting Attorney and Chair of the Board of County Commissioners.  
23

24 While Canvassing Board Members are only prohibited from  
25 canvassing a contest in which they are named - as a general practice the  
26

1 Spokane County Auditor ("Auditor") has designated a Canvassing Board  
2 representative whenever the auditor's contest appears on the ballot (CP,  
3  
4 pg. 25).

5 Spokane County conducts vote by mail elections and does not  
6  
7 utilize any direct recording devices (CP, pg. 29). On November 23, 2010,  
8 the Canvassing Board certified the 2010 General Election results. (CP, pg.  
9  
10 30).

11 The Spokane County Auditor's race "official certified election  
12 results" were 98,326 votes for Dalton and 76,731 votes for Christensen.  
13  
14 (CP, pg. 30). The incumbent Auditor prevailed by 21,595 votes.

15 On November 23, 2010, Petitioner submitted a "request for a hand  
16  
17 recount" of a portion of votes cast in the Auditor's race. (CP, pg. 30). The  
18 request of the Petitioner sought a hand recount of votes by batch, and  
19  
20 Petitioner paid a commensurate fee for this recount. (CP, pg. 17).

21 Because of the 21,595 vote margin, Petitioner's demand for a recount of  
22  
23 17,100 ballots never exceeded could not amount to an election challenge.

24 Following receipt, the Auditor conferred with legal counsel and the  
25  
26 Secretary of State's Office, and on November 24, 2010, "a reply was sent

1 by email and by US postal mail to Cindy Zapotocky, Chairman Spokane  
2 County Republican Party. The reply claimed that the recount “cannot be  
3 conducted in the manner you have requested.” (CP, Pg. 20). Petitioner  
4 had requested “a partial recount by hand of a ‘portion of votes cast”. (CP,  
5 pg. 20). Respondent also claimed that “because your request is based on  
6 batches, the precinct totals cannot be properly identified or generated to be  
7 amended.” (CP, pg. 20). Respondent refused to do a partial recount by  
8 batch, and instead insisted that she would only count by precinct. (CP, pg.  
9 20).  
10

11  
12  
13  
14 On November 30, 2010, Petitioner sent an amended demand to  
15 Respondent, requesting a count of 17,100 ballots, short of the margin  
16 necessary to amount to an election contest. (CP, pg. 21).  
17

18 Auditor also received under separate cover, a written  
19 correspondence from Petitioner directing specifically how Petitioner  
20 wanted the recount conducted (CP, pg. 23).  
21

22 On November 30, 2010, Respondent again denied Petitioner's  
23 amended request by letter. (CP, pg. 22). Respondent again claimed that  
24 because the request was based on batches, the precinct totals “cannot be  
25  
26

1 properly identified or generated to be amended. In some batches, data is  
2 not available because it was not saved to disk.” However, Michael  
3  
4 McLaughlin, in his affidavit states that:

5           Spokane County Elections creates "batches" of ballots to be  
6           counted for purposes of quality control audits and reviews. These  
7           batches usually contain between 1 and 205 ballots. They usually are  
8           made up of a group of precincts based on the precinct number. We  
9           are not able to create separate reports of results for these batches.  
10           All Official Election Reports are done based on precinct results.  
          (CP, pg. 32).

11           This was in response to a demand for a *hand recount*. Respondent  
12 goes on to admit that should she actually count the votes by hand that the  
13 “data saved to disk would require alteration of existing totals to produce  
14 batch reports by precinct.” Respondent then goes on to again deny the  
15 demand for a hand recount from Petitioner, telling her that the results of  
16 the 2010 General Election are certified, although the statute provides for  
17 the request following certification.  
18  
19  
20

21           Petitioner also received a hand delivered copy in the election office  
22 on November 30, 2010. (CP, pg. 31).  
23  
24  
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1           Mandamus will issue against a public officer in his official  
2 capacity to compel a duty imposed by law. *Eugster v. City of Spokane*, 118  
3 Wn. App. 383, 403-404, 76 P.3d 741 (2003); *Adams v. Seattle*, 31 Wn.2d  
4 147, 151, 195 P.2d 634 (1948); *State ex rel. Bloedel-Donavan Lumber*  
5 *Mills v. Clausell*, 122 Wash. 531, 211 Pac. 281 (1922).  
6  
7

8           RCW 7.16.160 recognizes this general rule and provides that a writ  
9 of mandate “may be issued by any court, except a district or municipal  
10 court, to any inferior tribunal, corporation, board or person, to compel the  
11 performance of an act which the law especially enjoins as a duty resulting  
12 from an office, trust or station, or to compel the admission of a party to the  
13 use and enjoyment of a right or office to which the party is entitled, and  
14 from which the party is unlawfully precluded by such inferior tribunal,  
15 corporation, board or person.”  
16  
17

18           An applicant bears the burden of proving all elements to justify  
19 mandamus. *Eugster v. City of Spokane*, 118 Wn. App. 383, 403, 76 P.3d  
20 741 (2003), citing, *Mallard v. U. S. Dist. Court*, 490 U.S. 296, 309, 109 S.  
21 Ct. 1814, 104 L. Ed.2d 318 (1989).  
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1           A Writ of Mandamus can only issue when there is no plain, speedy  
2 and adequate remedy at law. *Staples v. Benton County*, 151 Wn.2d 460, 89  
3 P.3d 706 (2004). (See, RCW 7.16.170). Finally, an application for a Writ  
4 of Mandamus must be supported by an affidavit by a party “beneficially  
5 interested.” *Retired Pub. Emples. Council of Wash. v. Charles*, 148 Wn.2d  
6 602, 62 P.3d 470 (2003).  
7

8  
9           **1. Respondent Had A Legal Duty To Perform A Recount.**  
10

11           Generally, and applicable to all arguments here is the rule set forth  
12 in *Quigley v. Phelps*, to wit: “The right to contest an election ‘rest solely  
13 upon, and is limited by, the provision of the statute relative thereto.’”  
14 *Quigley v. Phelps*, 74 Wash. 73, 75, 132 P. 783 (1913).  
15

16           RCW 29A.64.030 provides that, upon the payment of fees as  
17 provided for therein, the “county canvassing board *shall* [emphasis added]  
18 determine the date, time, and place or places at which the recount will be  
19 conducted.” In addition, “[n]ot less than two days before the date of the  
20 recount, the county auditor *shall* [emphasis added] mail a notice of the  
21 time and place of the recount to the applicant or affected parties and, if the  
22 recount involves an office, to any person for whom votes were cast for that  
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1 office. The county auditor *shall* [emphasis added] also notify the affected  
2 parties by either telephone, fax, e-mail, or other electronic means at the  
3 time of mailing.” Respondent refused to do any of these things.  
4

5 RCW 29A.64.041(1) provides that [a]t the time and place  
6 established for a recount, the canvassing board or its duly authorized  
7 representatives, in the presence of all witnesses who may be in attendance,  
8 *shall* [emphasis added] open the sealed containers containing the ballots to  
9 be recounted, and *shall* [emphasis added] recount the votes for the offices  
10 or issues for which the recount has been ordered.  
11  
12

13 The duty to canvass the votes is mandatory. *State ex rel. Heavey v.*  
14 *Murphy*, 138 Wash.2d 800, 804-05, 982 P.2d 611(1999).  
15

16 “When a ballot is sufficiently plain to gather therefrom a part of the  
17 voter’s intention, it shall be *the duty* [emphasis added] of the judges of the  
18 election to count such part.” *State ex rel. Robeson v. Clark*, 28 Wash.2d  
19 276, 182 P.2d 68 (1947), *citing State ex rel. Orr v. Fawcett*, 17 Wash. 188,  
20 49 P. 346.  
21  
22

23 “As a general rule, the use of the word “shall” is imperative and  
24 operates to create a duty.” *Ballasiotes v. Gardner*, 97 Wash.2d 191, 195,  
25  
26

1 642 P.2d 397, 399 (Wash. 1982), citing *State Liquor Control Bd. v. State*  
2 *Personnel Bd.*, 88 Wash.2d 368, 377, 561 P.2d 195 (1977).  
3

4 **2. Respondent Did Not Have Discretion To Deny Petitioner's**  
5 **Demand For A Limited Recount.**

6 Mandamus does not lie to compel the performance of acts or duties  
7 that call for the exercise of discretion on the part of public officers.  
8 *Lillions v. Gibbs*, 47 Wn.2d 629, 633, 289 P.2d203 (1955), *O'Connor v.*  
9 *Matzdorff*, 76 Wn.2d 589, 458 P.2d 154 (1969).  
10  
11

12 A discretionary act is one that involves a policy, program, or  
13 objective, and allows for the exercise of a basic policy evaluation,  
14 judgment, and expertise on the part of an officer or agency. *Bridle Trails*  
15 *Comty Club v. Bellevue*, 45 Wn. App. 248,724 P.2d 1110 (1986).  
16  
17

18 In election contests, the court has found discretion only on a  
19 limited basis, and then on proactive terms to otherwise meet the  
20 requirements and duties of the statute. For instance, in *Wash. State*  
21 *Republican Party v. King County*, 153 Wash.2d 220, 224, 103 P.3d 725  
22 (2004) the Washington State Republican Party and two individuals filed an  
23 action for declaratory and injunctive relief against county canvassing board  
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1 and the county division of records, elections, and licensing services, and  
2 sought temporary restraining order *prohibiting* recanvassing of 573 ballots  
3 during a hand recount of the election for governor. The Supreme Court  
4 held that the canvassing board had statutory authority to recanvass the  
5 ballots to determine whether the failure to count those ballots was  
6 erroneous.  
7

8  
9 The statute in effect when the court issued its one opinion on  
10 recanvassing prior to *Wash. State Republican Party v. King County*  
11 “permitted the opening of voting machines to recanvass the vote . . .  
12 whenever it shall appear that there is a discrepancy in the returns of any  
13 election district . . .” *Citing State ex rel. Doyle v. Superior Court of King*  
14 *County*, 138 Wash. 488, 244 P. 702 (1926). A “discrepancy” is defined as  
15 “something to indicate that an error or a mistake has been made; that the  
16 total as shown is not a true one.” *Wash. State Republican Party v. King*  
17 *County*, 153 Wash.2d 220, 224, 103 P.3d 725 (2004), *citing Doyle, op. cit.*,  
18 at 492. The discretionary act in this case was statutorily authorized.  
19  
20

21 Respondent claims it was impossible to count by batch, yet  
22 counting by batch is provided for by WAC 434-264-090:  
23  
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1 Prior to beginning a manual recount, all ballots that were originally  
2 tabulated at the poll site must be inspected. All ballots must be  
3 sorted by precinct. *If a results report can be produced by batch,*  
4 *ballots may be sorted by batch.*

5 Respondent is mandated under WAC 434-264-070 as follows: “In  
6 a manual recount, *the county auditor must compare the paper records with*  
7 *the electronic results cast on direct recording electronic devices.”*

8 [Emphasis added]. WAC 434-264-070. Compare this language with  
9 Respondent’s letter to Petitioner of November 30, 2010, where she says  
10 “[i]n some batches, data saved to disk would require alteration of existing  
11 totals to produce batch reports by precinct. Since the results of the 2010  
12 General Election are certified, we cannot alter the existing data.”

13 The WAC governing manual recounts is not discretionary,  
14 providing additionally as follows:

15 WAC 434-264-070

16 (1) Written procedures to perform manual recounts of direct  
17 recording electronic devices *must be* [emphasis added]  
18 promulgated by the county auditor. The procedures for manually  
19 tabulating results must be conducted using a process that includes  
20 the following elements:

21 (a) A continuous paper record *must be* [emphasis added]  
22 utilized; the paper record *must not be* [emphasis added] cut into  
23

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1 separate individual records;

2 (b) If a paper record indicates a ballot has been canceled, the  
3 ballot *must be* [emphasis added] exempt from the recount; and

4 (c) If the paper records are incomplete, the ballot images stored  
5 on the direct recording electronic device *must be* [emphasis added]  
6 printed and then compared to the electronic results recorded on the  
7 direct recording electronic device.

8 (2) If there is a discrepancy between the electronic results and  
9 the paper record results, the canvassing board *must take necessary*  
10 *action* [emphasis added] to investigate and resolve the discrepancy.  
11 The canvassing board *must prepare* [emphasis added] a public  
12 report that outlines the discrepancy and how it was resolved. The  
13 results as determined by the canvassing board *must replace*  
14 [emphasis added] the electronic results in the official certification.

14 (3) If there is a discrepancy that cannot be resolved:

15 (a) The secretary of state *must be* [emphasis added] notified  
16 immediately; and

17 (b) The vendor *must be* [emphasis added] notified and required to  
18 provide a satisfactory explanation for the discrepancy within thirty days.

19 Here, Respondent has admitted that a discrepancy exists, but has  
20 failed to meet her mandated duty under Washington law, beginning with  
21 the failure to honor the demand for a partial recount made by Petitioner.

22 Petitioner's demand was also statutorily authorized under RCW  
23 29A.64.011:  
24  
25

26

1 An officer of a political party or any person for whom votes were  
2 cast in a primary who was not declared nominated *may file a*  
3 *written application* for a recount of the votes ***or a portion of the***  
4 ***votes*** cast at that primary for all persons for whom votes were cast  
*for nomination* to that office. [Bold and italics added].

5 An officer of a political party or any person for whom votes were  
6 cast at any election may file a written application for a recount of  
7 the votes *or a portion of the votes* cast at that election for all  
8 candidates *for election* to that office. [Italics added].

9 An application for a recount of the votes cast for an office or on a  
10 ballot measure ***must be filed with the officer with whom filings are***  
***made for the jurisdiction.*** [Italics added].

11 An application for a recount *must specify* whether the recount will  
12 be done *manually* or by the vote tally system. A recount done by  
13 the vote tally system must use programming that recounts and  
14 reports only the office or ballot measure in question. *The county*  
15 *shall also provide for a test of the logic and accuracy of that*  
*program.* [Italics added].

16 An application for a recount must be filed *within three business*  
17 *days* after the county canvassing board or secretary of state *has*  
18 *declared the official results* of the primary or election for the office  
19 or issue for which the recount is requested.

20 Pursuant to this statute, the record reflects that Petitioner filed a  
21 written application for a manual recount of a portion of the votes cast with  
22 the officer (the Auditor) with whom filings are made for the jurisdiction.

24 The canvassing board, operating under the authority of Respondent  
25  
26

1 then had a non-discretionary legal duty to recount the votes as requested  
2 pursuant to RCW 29A.64.021:  
3

4 (1) At the time and place established for a recount, the canvassing  
5 board or its duly authorized representatives, in the presence of all  
6 witnesses who may be in attendance, *shall* open the sealed  
7 containers containing the ballots to be recounted, *and shall recount*  
8 *the votes* for the offices or issues for which the recount has been  
9 ordered. Ballots shall be handled only by the members of the  
10 canvassing board or their duly authorized representatives. [Italics  
11 added].

12 Respondent has no discretion under statutes that set forth  
13 obligations which she “must do” and which she “shall do.” “As a general  
14 rule, the use of the word “shall” is imperative and operates to create a  
15 duty.” *Ballasiotes v. Gardner*, 97 Wash.2d 191, 195, 642 P.2d 397, 399  
16 (Wash. 1982), citing *State Liquor Control Bd. v. State Personnel Bd.*, 88  
17 Wash.2d 368, 377, 561 P.2d 195 (1977).  
18

19 **3. Petitioner Did Not Have Another Plain, Speedy Remedy At**  
20 **Law.**

21  
22 Petitioner sought a Recount under the Recount statutes RCW  
23 29A.64.011 – 29A.64.100, which fall generally under the heading of RCW  
24 29A – Elections. Petitioner did not seek any other remedy, and did not  
25  
26

1 mount an election challenge or a challenge for voter fraud. Petitioner  
2 sought one remedy, and one remedy alone under the applicable statutes  
3 and administrative codes, namely a manual recount of a portion of the  
4 votes cast.  
5

6           Actions associated with elections “rest solely upon, and are limited  
7 by, the provision of the statute relative thereto.” *Quigley v. Phelps*, 74  
8 Wash. 73, 75, 132 P. 783 (1913). The time limitations set forth under the  
9 recount statutes, RCW 29A.64.011 – 29A.64.100, have all been met by  
10 Petitioner, yet Respondent was still able to neglect her statutory duty to  
11 perform the manual recount as requested.  
12

13           Respondent points to statutes limiting election challenges and the  
14 timeliness of actions thereafter as controlling in this instance. Petitioner  
15 asserts that the statutes governing recounts are simply silent on this issue.  
16 Moreover, Petitioner never sought a recount of sufficient enough size to  
17 effect a change in the overall election results.  
18

19           Petitioner simply sought to exercise the rights and privileges set  
20 forth in the express terms of the statute to require Respondent to perform a  
21 manual recount of a portion of the votes cast.  
22

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1           “Where the mayor and councilmen wholly neglected to discharge  
2 the duties devolving upon them by law, . . . Having so failed in their duty  
3 in the first instance, and the citizens having taken the matter in their own  
4 hands, and having conducted an election . . . and the city’s officers now  
5 further refuse to canvass the returns . . .” *State v. Mason*, 45 Wash. 234,  
6 234, 88 P. 126 (Wash 1907).  
7

8  
9           “In such cases, any citizen is beneficially interested, and may  
10 institute mandamus proceedings.” *State v. Mason*, 45 Wash. 234, 234, 88  
11 P. 126 (Wash 1907), *citing State ex rel. v. Tanzey*, 49 Ohio St. 656, 32  
12 N.E. 750; *Clay v. Ballard*, 87 Va. Common Council, 77 N.Y. 503, 33 Am.  
13 Rep. 659; *Moses v. Kearney*, 31 Ark. 261; *State v. Gracey*, 11 Nev. 223;  
14 *City of Ottawa v. People ex rel.*, 48 Ill. 233.  
15  
16  
17

18           **4. Petitioner Is A “Beneficially Interested Person” To Seek An**  
19 **Alternative Writ Of Mandate.**  
20

21           “Voters have sufficient interest to bring an action for mandamus in  
22 a case involving an election.” *In Re Recall of West*, 156 Wash.2d 244, 249,  
23 126 P.3d 798 (Wash. 2006), *citing State v. Mason*, 45 Wash. 234, 234, 88  
24 P. 126 (Wash 1907), *citing State ex rel. v. Tanzey*, 49 Ohio St. 656, 32  
25  
26

1 N.E. 750; *Clay v. Ballard*, 87 Va. Common Council, 77 N.Y. 503, 33 Am.  
2 Rep. 659; *Moses v. Kearney*, 31 Ark. 261; *State v. Gracey*, 11 Nev. 223;  
3  
4 *City of Ottawa v. People ex rel.*, 48 Ill. 233.

5           Petitioner is a voter. In addition, Petitioner was at all material  
6  
7 times, and when subject matter jurisdiction attached to the instant case, the  
8 Chairman of the Republican Party of Spokane County. (CP, pg. 5).

9           A beneficially interest party has been interpreted consistently with  
10  
11 the rules of standing. *Vovos v. Grant*, 87 Wash.2d 697, 699-700, 555 P.2d  
12 1343 (1976). A party generally has standing to raise an issue if he has “a  
13  
14 distinct and personal interest in the issue.” *Paris American Corp. v.*  
15 *McCausland*, 52 Wash.App. 434, 438, 759 P.2d 1210 (1988).

16           In deciding whether a plaintiff has standing, courts have looked  
17  
18 at whether the plaintiff has a special or peculiar interest which has been  
19  
20 aggrieved any differently in kind or degree than what is experienced by the  
21  
22 general public. *Ocean Spray Cranberries, Inc. v. Doyle*, 81 Wn.2d 146,  
23 154, 500 P.2d 79 (1972); *State ex rel. Gebhardt v. Superior Court*, 15  
24 Wn.2d 673, 680, 131 P.2d 943 (1942).

25  
26

1           The party’s injury must be one that “fairly can be traced to the  
2 challenged action” and “is likely to be redressed by a favorable decision.”  
3  
4       *Valley Forge Christian College v. Americans United for Separation of*  
5       *Church & State, Inc.*, 434 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700  
6  
7       (1982).

8           A favorable decision in this case would be to require Respondent  
9  
10       to perform the manual recount of the portion of votes cast as requested by  
11       Petitioner on the day the election results were declared. Petitioner was by  
12       statute a “beneficially interested party” as she was at that time “an officer  
13       of a political party.” RCW 29A.64.011. The cause of action in this case  
14       accrued on Respondent’s refusal given on November 24, 2010 to do her  
15       statutorily mandated duties. (CP, pg. 20).  
16  
17

18           **5. The Court Erred In Granting Summary Judgment And**  
19       **Dismissing The Petition For A Writ Of Mandate.**  
20

21           The Court of Appeals considers issues on summary judgment *de*  
22       *novo*. *Wilson v. Steinbach*, 98 Wash. 2d 434, 437, 656 P.2d 1030 (1982),  
23       and *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wash. 2d 1,  
24       12-13, 721 P.2d 1 (1986).  
25  
26



1 Respondent to perform a manual recount of the portion of the votes  
2 requested by Petitioner.  
3

4 Respectfully submitted, this 8<sup>th</sup> day of August, 2011  
5

6  
7 

8 STEPHEN PIDGEON, WSBA#25265  
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10 3002 Colby Avenue, Suite 306, Everett, WA 98201  
11 (425)605-4774

12 **CERTIFICATE OF SERVICE**

13 The undersigned, not a party to this action and being over 18 years of age,  
14 now certifies that a true and complete copy of the foregoing was personal  
15 served on the following:

16 Dan Catt, Attorney for Respondent  
17 Senior Deputy Prosecuting Attorney  
18 Spokane County Prosecuting Attorney  
19 West 1115 Broadway Avenue  
20 Spokane, Washington 99260

21 by hand delivery, this 8th day of August, 2011.  
22

23 \_\_\_\_\_  
24 Ruth Ryan  
25  
26