

FILED
Court of Appeals
Division III
State of Washington
12/6/2017 3:44 PM
Court of Appeals No. 351742
Grant Co. Superior Court Cause No. 17-2-00228-0

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

FRED MEISE, DOUG BIERMAN, PAT HOCHSTATTER, MIKE
COUNSELL, JASON MELCHER, AND JARED POPE,

Petitioners,

vs.

MICHELE JADERLUND, GRANT COUNTY AUDITOR,

Respondent,

and

KATIE PHIPPS, MICHELLE KITTRELL, KRISTA HAMILTON,
SUSAN MOBERG, CRAIG HARDER, DENNIS KEARNS, and
BARBARA KEARNS,

Intervenors.

PETITIONERS' ANSWER TO AMICUS CURIAE
MOSES LAKE SCHOOL DISTRICT

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Petitioners submit the following answer to the brief filed on behalf of amicus curiae Moses Lake School District (MLSD):

I. MLSD misstates the applicable limitations period.

MLSD echoes an argument made by Intervenors that Petitioners' election contest petition was untimely. In its brief, MLSD provides the following authority for its timeliness argument:

Election contests must be filed within ten days of the election's official certification:

An affidavit of an elector under this subsection shall be filed with the appropriate court no later than ten days following the official certification of the election.

RCW 29A.60.013.

MLSD Am. Br., at 6 (formatting & citation in original; footnote omitted). While MLSD purports to quote RCW 29A.60.013, no statute with that citation exists in the RCW, and chapter 29A.60 relates to canvassing, not election contests.¹

Presumably, MLSD intends to quote the limitations period for election contests stated in RCW 29A.68.013, but if so, the quotation is inaccurate, incomplete, and misleading. RCW 29A.68.013, which

¹ Counsel for Petitioners searched all Washington content on Westlaw for MLSD's quotation, and did not receive any "hits" other than MLSD's amicus brief in this case.

contains the limitations period governing this case, provides in pertinent part:

An affidavit of an elector under this subsection shall be filed with the appropriate court no later than ten days following the official certification *of the primary or* election *as provided in RCW 29A.60.190, 29A.60.240, or 29A.60.250 or, in the case of a recount, ten days after the official certification of the amended abstract as provided in RCW 29A.64.061.*

(Emphasis added.) MLSD's purported quotation is incomplete because it omits the highlighted language of the statute, in particular the language referring to the alternate limitations period in cases involving a recount. The purported quotation is also inaccurate because MLSD omitted material from its quotation without ellipses and inserted a period after the word "election" that is not in the statute. Lastly, MLSD's purported quotation is misleading because it seems to indicate that there is no alternate limitations period in the case of a recount. While MLSD later argues in its brief that a recount is irrelevant to the applicable limitations period, it does not acknowledge the language of the statute referring to the time limit for filing an election contest petition after a recount. *See* MLSD Am. Br., at 7-8.

MLSD's timeliness argument should be rejected as unsupported by any authority and contrary to the applicable time

limit established by the Legislature. MLSD fails to engage with the ruling of the superior court below that Petitioners' election contest petition was timely, or the arguments made in Petitioners' briefing. In particular, MLSD does not address the significance of the conjunction "or" as it appears in the text of the RCW 29A.68.013. *See* Petitioners' Reply, at 14. MLSD does not address the fact that the plain language of the statute does not require an election contest petition to be filed within 10 days after certification of the election if there is a recount. *See id.* at 15. MLSD does not address the fact that the plain language does not limit an election contest petition filed within 10 days after certification of a recount to only those issues arising in the course of the recount. *See id.* at 15. MLSD does not acknowledge the rule of construction that, when more than one limitations period is potentially applicable, the longer period will be applied. *See id.* at 14. In the final analysis, MLSD does not explain why an election contest petition should be filed before a recount if there is a possibility that the recount will render the petition moot. *See id.* at 15-16.

Petitioners do not quarrel with the proposition that timeliness is important in election contests. Nonetheless, because they filed

their election contest petition within the applicable limit established by the Legislature, the petition is timely.

II. MLSD misstates the proof necessary to annul the election.

MLSD contends that Petitioners must show the election result would have been different in order for the Court to grant the relief requested and annul the election. *See* MLSD Am. Br., at 8-10. MLSD supports this argument by quoting a single sentence isolated from the relevant statute, which states “If in any such case it shall appear that the results of a measure are reversed, said court shall declare the change in result.” *Id.* at 8 (quoting RCW 29A.68.050 in part). This sentence merely permits the court hearing an election contest to order a change in the result; it does not require a person contesting an election to show that the outcome would have been different.

In any event, MLSD’s selective quotation from RCW 29A.68.060 is incomplete, out-of-context, and misleading. The statute provides in its entirety:

The clerk shall issue subpoenas for witnesses in such contested election at the request of either party, which shall be served by the sheriff or constable, as other subpoenas, and the superior court shall have full power to issue attachments to compel the attendance of witnesses who shall have been duly subpoenaed to attend if they fail to do so.

The court shall meet at the time and place designated to determine such contested election by the rules of law and

evidence governing the determination of questions of law and fact, so far as the same may be applicable, and may dismiss the proceedings if the statement of the cause or causes of contest is insufficient, or for want of prosecution. ***After hearing the proofs and allegations of the parties, the court shall pronounce judgment in the premises, either confirming or annulling and setting aside such election, according to the law and right of the case.***

If in any such case it shall appear that another person than the one returned has the highest number of legal votes, said court shall declare such person duly elected. If in any such case it shall appear that the results of a measure are reversed, said court shall declare the change in result.

RCW 29A.68.060 (formatting in original; emphasis added). MLSD's quotation is incomplete because it omits the highlighted language, which indicates that "confirming or annulling" an election is the normal remedy. The language on which MLSD relies merely allows the Court to order a change in the election result in cases where it can determine how the outcome would have differed. It does not impose a burden on those contesting an election to establish whether or how the outcome would have differed in order to obtain annulment based on the misconduct of an election officer.

The sentence quoted by MLSD is out of context because a court is only required to consider whether misconduct had an effect on the result of an election if the election contest involves members of the county canvassing board or illegal votes. With respect to

misconduct of the county canvassing board, RCW 29A.68.070 provides:

No irregularity or improper conduct in the proceedings of any county canvassing board or any member of the board amounts to such malconduct as to annul or set aside any election unless the irregularity or improper conduct was such as to either, reverse the outcome of an election measure or procure the person whose right to the office may be contested, to be declared duly elected although the person did not receive the highest number of legal votes

Further, RCW 29A.68.080 provides:

When any election for an office exercised in and for a county is contested on account of any malconduct on the part of a county canvassing board, or any member thereof, the election shall not be annulled and set aside upon any proof thereof, unless the rejection of the vote of such precinct or precincts will change the result as to such office or measure in the remaining vote of the county

With respect to illegal votes, RCW 29A.68.110 provides:

(1) No election for an office may be set aside on account of illegal votes, unless it appears that an amount of illegal votes has been given to the person whose right is being contested, that, if taken from that person, would reduce the number of the person's legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes that may be shown to have been given to the other person.

(2) No election for a measure may be set aside on account of illegal votes, unless it appears that an amount of illegal votes has been given to the winning choice being contested, that, if taken from that winning choice, would reduce the number of legal votes for the winning choice below the number of votes given to the other choice, after deducting therefrom the illegal votes that may be shown to have been given to the other choice.

(Formatting in original.)² No other provision of Washington's election laws requires the Court to consider whether or how the outcome would have differed as a result of misconduct by an election officer. There is certainly none that applies to the Grant County Auditor's failure to comply with the telephone requirement of RCW 29A.60.165(1) and (2)(a) in this case.

The integrity of elections is sufficiently important that misconduct by an election officer must result in annulment of the election whenever a different outcome is **possible**. The relevant authorities are summarized in detail on pages 8-10 of Petitioners' reply brief, and will not be addressed further here. Suffice it to say that MLSD fails to engage with Petitioners' discussion of these authorities in any meaningful way. Because 31 votes were not counted as a result of the Grant County Auditor's misconduct in this case, and the electoral margin was only two votes, there is sufficient possibility of a different outcome to require annulment of the election.

² The authorities on which MLSD relies involve illegal votes, as is evident from the parentheticals describing the cases. See MLSD Am. Br., at 10 n.17. In addition, the oral decision of the Chelan County Superior Court in *Borders v. King County* is not properly cited. See GR 14.1.

III. The Court should ignore non-legally cognizable political arguments by MLSD.

Among other things, MLSD argues that approval of the bonds that are the subject of the election that is being contested “is needed for the safe and effective education of Moses Lake School District students.” MLSD Am. Br., at 4. This type of argument is not legally cognizable and should be ignored by the Court. It is an essentially political argument, which begs the question of how best to ensure that students receive the most “safe and effective education.” Such arguments should be made to voters, and the will of the voters should be given effect after a properly conducted election.

IV. Petitioners do not object to expedited consideration of this appeal.

MLSD urges the Court to expedite consideration of this case. Petitioners have made the same proposal to Respondent and Intervenor on several occasions previously, and they endorse MLSD’s request. Everyone’s interests are served by a speedy resolution of this matter.

Respectfully submitted this 6th day of December, 2017.

s/George M. Ahrend

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

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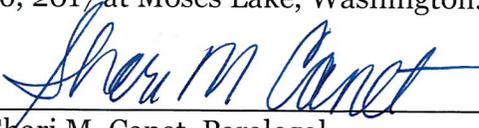
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December 06, 2017 - 3:44 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35174-2
Appellate Court Case Title: Fred Meise, et al v. Michele Jaderlund, Grant County Auditor
Superior Court Case Number: 17-2-00228-0

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