

**FILED**

SEP 14 2011

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

NO. 29875-2-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

CINDY ZAPOTOCKY,

Appellants,

v.

VICKY M. DALTON,  
SPOKANE COUNTY AUDITOR,

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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BRIEF OF SPOKANE COUNTY AUDITOR

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STEVEN J. TUCKER  
Prosecuting Attorney

Dan L Catt, WSBA# 11606  
Deputy Prosecuting Attorney  
Attorneys for Spokane County Auditor  
Spokane County Prosecutor's Office  
W. 1115 Broadway, 2<sup>nd</sup> Floor  
Spokane, Washington 99260  
(509) 477-5764

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## **I. APPELLANTS' ASSIGNMENTS OF ERROR**

1. The court on summary judgment erred in finding the Spokane County Auditor had no legal duty to execute the recount as requested by Zapotocky.

2. The court on summary judgment erred in finding that the Spokane County Auditor had discretion to deny Zapotocky's request for a recount.

3. The court on summary judgment erred in finding that Zapotocky had another speedy [adequate] remedy at law.

4. The court on summary judgment erred finding that Zapotocky was not a beneficially interested person.

5. The court erred in granting the Spokane County Auditor's motion for summary judgment.

## **II. ISSUES PRESENTED ON APPEAL**

Respondent Vicky Dalton, Spokane County Auditor (hereinafter "Spokane County Auditor") disagrees with Appellant's Cindy Zapotocky's (hereinafter "Zapotocky") Statement of Issues on appeal. The following identifies the issues that dispose of this case:

1. Does chapter 29A.64 RCW enjoin the Spokane County Auditor to recount a portion of votes cast during the 2010 general election in a manner that precludes the preparation and filing of statutorily mandated amended election results when the recount is completed?

2. Is Zapotocky's failure to utilize the plain, speedy, and adequate remedies under chapter 29A.68 RCW a bar to issuing the writ of mandate?
3. Is Zapotocky a "party beneficially interested" under chapter 7.16 RCW to compel a recount when she no longer has standing under RCW 29A.64.011?

### **III. COUNTER-STATEMENT OF THE CASE**

This appeal is from the CR 56 dismissal of Zapotocky Application for Writ of Mandate seeking to compel respondent Spokane County Auditor<sup>1</sup>, to recount by hand selected ballots returned, tabulated, and canvassed in the November 2, 2010, General Election (CP 1-3). Zapotocky did not contest the certified election results, or allege election fraud. (RP 11)

#### **A. 2010 GENERAL ELECTION BACKGROUND**

The county auditor, county prosecuting attorney and chair of the county legislative body comprise the members of a county canvassing board. RCW 29A.60.140. While canvassing board members are only prohibited from canvassing a contest in which they are named, as a general practice the Spokane County Auditor has designated a canvassing board representative whenever the auditors' contest appears on the ballot (CP 25). During the canvassing of the 2010 General Election, Michael McLaughlin, Spokane

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<sup>1</sup> Spokane County Auditor has the overall responsibility to maintain voter registration and to conduct state and local elections in a Spokane County. RCW 29A.04.025.

County Deputy Auditor and Elections Manager (hereinafter “McLaughlin”) was Spokane County Auditor’s canvassing board designee (CP 36).

Spokane County conducts elections entirely “vote by mail” and utilizes no direct recording devices (CP 29). Following the canvassing, on November 23, 2010, the Canvassing Board certified the 2010 General Election results (CP 30 and 35). The Spokane County Auditor’s race “official certified election results” were 98,326 votes for incumbent Vicky Dalton and 76,731 votes for the opponent (CP 30 & 38). The incumbent prevailed by 21,595 votes.

On November 23, 2010, Zapotocky submitted a “request for a hand recount”<sup>2</sup> of a portion of votes cast in the Auditor’s race, accompanied by a deposit. (CP 19 & 30). Recount of ballots in an election after certification is highly regulated and requires amended election results. Chapter 29A.64 RCW. Spokane County Auditor conferred with McLaughlin, legal counsel, and a Deputy Solicitor General from the Secretary of State’s Office prior to sending Zapotocky a written response on November 24, 2010, explaining why a recount could not be conducted in the manner requested. (CP 20 & 30). Zapotocky was notified she had until the end of business on November 30, 2010, to re-file her recount request specifying which precincts she

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<sup>2</sup> At the time Zapotocky was Chief Officer for the Spokane County Republican Party Central Committee and qualified under RCW 29A.64.011 to request a recount.

wished recounted (CP 20). On November 30, 2010, McLaughlin received Zapotocky's revised recount request which again failed to designate a portion of votes that would allow an amendment of election results at the completion of the recount (CP 21, 23 & 30). Under separate cover, Spokane County Auditor received correspondence from Zapotocky directing with specificity how she wanted the recount conducted (CP 23). On November 30, 2010, Zapotocky's was notified in writing that a recount could not be conducted in the fashion requested (CP 22 & 31).

**B. APPLICATION FOR ALTERNATIVE WRIT**

Between November 30, 2010, when Zapotocky was notified her application for recount would not be conducted, and the time she filed her Writ Application, on December 20, 2010, the following events occurred: (1) On December 7, 2010, the Executive Board of the Spokane County Central Committee met in formal session and voted not to support legal action to enforce Zapotocky's recount request<sup>3</sup>; (2) On December 9, 2010, Zapotocky signed her original Affidavit in Support of the Application for Alternative Writ of Mandate, representing herself as Chair of the Spokane County Republican Party (CP 5); and (3) On December 11, 2010, Spokane County

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<sup>3</sup> Fact was submitted: On good faith and belief based on speaking with a current Spokane County Republican Committee officer (CP 25); and was unchallenged by Zapotocky.

Republican Party Central Committee met and elected Matthew Pederson as Chair of the Spokane County Republican Party, replacing Zapotocky (CP 1-6, 30 & 36).

Zapotocky's Application for Alternative Writ of Mandate, filed December 20, 2011, requested the Court compel the Spokane County Auditor to fulfill a clear non-discretionary legal duty to conduct a recount pursuant to RCW 29A.64.011 and WAC 434-264-070 (CP at 2-3). The essence of Zapotocky's argument: RCW 29A.64.011 and WAC 434-264-070 enjoin a county auditor recount any portion of ballots cast in a General Election, irrespective of whether amended election returns can be generated. Zapotocky's requested recount groups were each comprised of ballots from numerous precincts. (CP 19). The groups included partial runs from separate tabulating machines from different dates and times. (CP 30-31). Some of the ballots represented "audit batches" ran as part of the quality assurance tests during the ballot processing as provided for under RCW 29A.60.170(4) (CP 30). Some of requested groups could not be recreated because they were a small portion of a larger group (CP 31). None of Zapotocky's designated groups of ballots individually or all of them collectively, would allow at the completion of the recount, amendment of official election results (CP 30-32).

The Spokane County Auditor did not refuse to conduct a recount (CP 20). The Spokane County Auditor refused to recount the ballots designated by Zapotocky because the request failed to designate ballots that would allow the fulfillment of a clear legal duty to prepare “amended abstract of votes” and for the Canvassing Board to prepare an “amended certification” (CP 20 & 22). Zapotocky has not disputed Spokane County Auditor’s position that amended election results cannot be generated from recounting the portion of votes she requests (RP 10).

**C. PROCEDURAL HISTORY**

Zapotocky filed the Alternative Writ of Mandate on December 20, 2010, with the Spokane County Superior Court (CP 1). On December 27, 2010, Spokane County Auditor filed a formal Answer and Affirmative Defenses (CP 8-13). On December 29, 2010, The Honorable Rebecca M. Baker, visiting judge from Steven’s County Superior Court, presided over the matter and conducted a telephonic hearing concerning Zapotocky’s Application for Alternative Writ of Mandate (CP 14). Judge Baker denied the application, granted Zapotocky time to submit corrections, and set scheduling (CP 14). Zapotocky filed an Amended Affidavit and Exhibits in support of the Application. (CP 16-23). Spokane County Auditor brought a Motion for Summary Dismissal supported by affidavits (CP 24-71).

Zapotocky's filed a response brief (CP 72-86). Spokane County Auditor elected not to file a reply brief. The Honorable Rebecca M. Baker, at the conclusion of a telephonic hearing on April 14, 2011 granted Spokane County's Summary Dismissal, articulating in detail her finding of fact and conclusion of law. (RP 9-13). The court entered a dismissal order on April 20, 2011 (CP 87-89).

#### **IV. LAW AND ARGUMENT**

##### **A. STANDARDS OF REVIEW**

###### **1. Statutory Interpretation**

This appeal presents questions of statutory interpretation which this court reviews *de novo*. *Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 298, 149 P.3d 666 (2006) ("Statutory interpretation is a question of law, subject to *de novo* review.")

###### **2. Summary Judgment**

This court also reviews cases resolved on summary judgment *de novo*, considering the same evidence presented to the trial court. *Citizens Protecting Res. v. Yakima County*, 152 Wn. App. 914, 919, 219 P.3d 730, 732-33 (2009) *review denied*, 168 Wn.2d 1024, 228 P.3d 18 (2010); *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

Summary judgment is appropriate whenever the pleadings,

depositions, and other records on file, together with any affidavits submitted with the motion, show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Jacobsen v. State*, 89 Wn.2d 104, 108-109, 569 P.2d 1152 (1977). Once the moving party makes a showing that it is entitled to judgment, the opposing party must come forward with specific facts to establish the existence of a genuine issue of fact, failure to respond properly results in issuance of judgment against the non-responding party. *Bankhead v. City of Tacoma*, 23 Wn. App. 631, 639, 597 P.2d 920 (1979) and *Carlson v. Milbrad*, 68 Wn.2d 847, 851-852, 415 P.2d 1020 (1966).

Summary judgment is mandated against a party who fails to demonstrate the existence of an element essential to that party and upon which that party bears the burden of proof. The “complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The Washington and Federal Courts have observed that the purpose of summary judgment is to avoid unnecessary trials where there is no dispute as to the facts before the Court. *Zweig v. Hearst Corp.*, 521 F. 2nd 1129 (9th Cir. 1975) *cert. denied*, 423 U.S. 1025 (1975).

**3. Appellate Courts Can Affirm On Any Grounds That Will Sustain The Trial Court's Dismissal**

Another standard for appellate review that pertains to Zapotocky's appeal is that any grounds that support the trial court's dismissal can be the basis for affirming the result below. *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984); *Yurtis v. Phipps*, 143 Wn. App. 680, 690, 181 P.3d 849 (2008). Where, as here, the trial court's judgment was based on a number of grounds<sup>4</sup>, the court need only find one of the bases justified in order to affirm.

**B. WRIT OF MANDATE**

A Writ of Mandate is a constitutional and statutory cause of action provided for in chapter 7.16 RCW. Mandamus is an extraordinary remedy to be used sparingly. *Burg v. City of Seattle*, 32 Wn. App. 286, 290, 647 P.2d 517 (1982).

Mandamus will issue *only* against a public officer in his official capacity to compel a *duty imposed by law*. *Eugster v. City of Spokane*, 118 Wn. App. 383, 403-404, 76 P.3d 741 (2003); *Adams v. City of Seattle*, 31 Wn.2d 147, 151, 195 P.2d 634 (1948); *State ex rel. Bloedel-Donavan*

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<sup>4</sup> Judge Baker found Zapotocky failed to meet any of the required elements for a Writ of Mandate to issue.(RP 9-13)

*Lumber Mills v. Clausen*, 122 Wash. 531, 211 P. 281 (1922). RCW

7.16.160 recognizes this general rule and provides as follows:

It may be issued by any court, except a district or municipal court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board or person. (Emphasis added).

Mandamus will **not lie** to compel the performance of acts or duties that call for the exercise of **discretion** on the part of public officers. *Lillions v. Gibbs*, 47 Wn.2d 629, 633, 289 P.2d 203 (1955), *O'Connor v. Matzdorff*, 76 Wn.2d 589, 458 P.2d 154 (1969).

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

An applicant bears the burden of proving all elements to justify mandamus. *Eugster supra* at 403 (2003), citing, *Mallard v. U. S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 309, 109 S. Ct. 1814, 104 L. Ed.2d 318 (1989).

A Writ of Mandamus can only issue when there is no plain, speedy and adequate remedy at law. *Staples v. Benton County*, 151 Wn.2d 460, 89 P.3d 706 (2004). (See, RCW 7.16.170).

Finally, an application for a Writ of Mandamus must be supported by an affidavit by a party “beneficially interested.” *Retired Pub. Employees Council of Washington v. Charles*, 148 Wn.2d 602, 62 P.3d 470 (2003). (See, RCW 7.16.170)

**C. CHAPTER 29A.64 RCW DOES NOT IMPOSE A CLEAR LEGAL DUTY UPON A COUNTY AUDITOR TO CONDUCT A RECOUNT OF A PORTION OF VOTES CAST DURING THE 2010 GENERAL ELECTION THAT PRECLUDES THE PREPARATION AND FILING OF STATUTORILY MANDATED AMENDED ELECTION RESULTS**

Zapotocky asserts the trial Court erred in granting summary dismissal because the Spokane County Auditor has a non-discretionary “legal duty” to recount in the manner requested a portion of ballots returned in a county election contest from the 2010 General Election (CP 1-3). A county auditor’s elections duties, as ex-officio supervisor of elections, are largely ministerial RCW 29A.04.216 and *State v. Superior Court for King County*, 121 Wash. 588, 591, 210 P. 15, 16 (1922) (an auditor’s functions, though largely ministerial, does require some discretion to fulfill lawful duties).

Elections are a fundamental part of democracy and each step of the process, from the dates on which elections may be held through challenging a certified election result is highly regulated. (See Title 29A RCW, Title 434 WAC). The procedures regulating a recount of returned ballots are predominately located in chapter 29A.64 RCW and chapter 434-264 WAC. The term “recount” as applied in election law is essentially a term of art. RCW 29A.04.139 defines “recount” as:

"Recount" means the process of retabulating ballots and **producing amended election returns** based on that retabulation, even if the vote totals have not changed. (Emphasis added)

The preceding definition applies to the term “recount” wherever used in Title 29A RCW, unless where used the context clearly indicates to the contrary or is otherwise defined. RCW 29A.04.001.

Recounts are utilized to verify election results in close contests. For example: A “mandatory recount” is automatically triggered when the vote total between opponents is less than one thousand votes and also less than one-fourth of one percent of the total number of votes cast for both candidates. RCW 29A.64.021. The election contest in which Zapotocky requested a partial recount was not a close contest and did not trigger a mandatory recount (CP 30 & 35, and RCW 29A.64.021).

The recount Zapotocky requested comes under the provisions of RCW 29A.64.011. The statute limits who may make application for a recount to a person for whom votes were cast in the election; a group of 5 (five) registered voters; or an officer of a political party. At the time Zapotocky submitted an application for a recount, she was qualified under the second paragraph of the statute as an officer of a political party (CP 25). Applications for non-mandatory recounts must at the time of the application, “. . . deposit with the county canvassing board or secretary of state, in cash or by certified check in a sum equal to twenty-five cents for each ballot cast in the jurisdiction or portion of the jurisdiction for which the recount is requested. . .” RCW 29A.64.030. Assuming a recount is conducted, RCW 29A.64.041(2) allows the applicant to withdraw the written request “At any time before the ballots from **all of the precincts listed in the application** for the recount have been recounted . . .”.

Zapotocky’s application was for a manual recount, which brought into play chapter 434-264 WAC. Under WAC 434-264-090, prior to beginning a manual recount, all ballots **must be sorted by precinct**. Instructions on how to recount ballots are located in WAC 434-264-110. Under WAC 434-264-110(2) the auditor is given the discretion to establish a recounting process utilizing either precincts or batches, so long

as the counting board only does one at a time. Spokane County Auditor utilizes batches solely for purposes of conducting quality assurance tests under RCW 29A.60.170 and all reporting is done by precinct. (CP 32). RCW 29A.16.060 requires election returns in general elections to be reported by individual precinct but recognizes a county auditor's limited discretion in the election process by allowing precincts to be combined, united or divided for purposes of holding an election.

As previously noted, a recount by definition under RCW 29A.04.139 requires amended election returns. Amended election returns must be certified and distributed by Canvassing Board.

RCW 29A.64.061 "Amended Abstracts" provides in pertinent part:

Upon completion of the canvass of a recount, the canvassing board shall prepare and certify an amended abstract showing the votes cast **in each precinct for which the recount was conducted.** Copies of the amended abstracts must be transmitted to the same officers who received the abstract on which the recount was based.

(Emphasis added)

County canvassing boards must certify county election results under RCW 29A.60.010. Canvassing of an election "means the process of examining ballots or groups of ballots, subtotals, and cumulative totals in order to determine the official returns of a primary or general election . . ."

RCW 29A.04.013.

The canvassing process incorporates checks and balances. For example: RCW 29A.60.170(4) authorizes random checks of the ballot counting equipment<sup>5</sup>;

RCW 29A.60.200 mandates the Canvassing Board shall **verify the results from the precincts**. . . ; and, RCW 29A.60.210 mandates what actions must take place if the Canvassing Board becomes aware of any apparent discrepancy or inconsistency in the returns. When the canvassing of election results is complete, the Canvassing Board issues a certification of the official election results, or in this case amendment of the certification certificate. RCW 29A.60.190.

A “recount” requires the Canvassing Board to produce and certify an “amended election return” under RCW 29A.64.061. To amend election returns, “The county auditor shall prepare an amended abstract of the recounted ballots for the county canvassing board. The amended abstract shall include a revised cumulative summary, as well as the votes cast in each precinct for the office or measure that was recounted.” WAC 434-264-130(1). “The county canvassing board shall certify the amended abstract that, for each precinct, displays the results of the office that has

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<sup>5</sup> Group One of Zapotocky’s “recount request” encompassed ballots previously part of a random check under RCW 29A.60.170(4). This is the only place in Title 29A RCW where the term “batches appears”.

been recounted. The new abstract shall be included in the amended certified canvass report.” WAC 434-264-130(4).

Arguably, if the Canvassing Board failed to issue an amended certification after completing a recount in the manner requested by Zapotocky, the failure could expose the board members to criminal sanctions under RCW 29A.84.720, pursuant to RCW 29A.60.200.

The Spokane County Auditor’s response to Zapotocky’s first application for recount did not refuse to conduct a recount, it gave notice that a recount could not be conducted as requested because a recount requires preparation of amended election returns, which requires that recounts be conducted by precincts.<sup>6</sup> (CP 19 & 22). Zapotocky was notified she had until close of business November 30, 2010 to amend her application by selecting specific precincts so that a recount could be conducted. (CP 20). Rather than amending the recount application as required, Zapotocky’s elected to essentially resubmit the same request, add another category increasing the recount total by 7,200 votes without submitting an additional deposit, and instructed on how she wanted the recount to be conducted. (CP 21, 23, & 31).

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<sup>6</sup> "Precinct" means a geographical subdivision for voting purposes that is established by a county legislative authority RCW 29A.04.121

Neither an amended abstract of votes nor amended election returns can be produced by compelling a recount of the votes designated by Zapotocky. (CP 30-31 and 32). Zapotocky has not disputed amended election results could not be prepared from a recount conducted of the votes designated by Zapotocky's in the manner requested, and the trial court's findings support this contention. (RP 10).

Zapotocky argues that the Spokane County Auditor has a non-discretionary duty to conduct a recount as requested, irrespective of whether it allows for amended election returns. Zapotocky first argues a non-discretionary duty is imposed under RCW 29A.64.011, obviously located within chapter 29A.64 RCW Recounts. The argument is spurious, because within the same chapter certification and filing of amended abstracts is mandated. RCW 29A.64.061. Zapotocky next argues the non-discretionary duty is also imposed under WAC 434-264-070 which regulates manual recounts of ballots cast on "direct recording electronic devices." This argument is also spurious, Spokane County does not utilize "direct recording electronic devices" and therefore the WAC 434-264-070 is not applicable. (CP 29).

Under the rules of statutory construction, each provision of a statute should be read together (in para materia) with other provisions in order to

determine the legislative intent. *State v. Chapman*, 140 Wn.2d 436, 448, 998 P.2d 282 *cert denied*, 531 U.S. 984 (2000). When recount provisions in Title 29A RCW or Title 434 WAC are read in para meteria, it is clear a recount cannot be conducted without amending election returns. Mandamus will not lie to compel an officer to do an act he could not lawfully do without mandate. *State ex rel. Egbert v. Blumberg*, 46 Wash. 270, 89 P. 708 (1907); *State ex rel. Town of Bothell v. Woody*, 90 Wash. 501, 156 P. 534 (1916); *State ex rel. Godfrey v. Turner*, 113 Wash. 214, 193 P. 715 (1920).

No Writ of Mandate can issue because a county auditor has no clear legal duty to conduct a recount of a portion of ballots cast in a general election that precludes the preparation of an amended abstract of votes, an amended election return, and an amended certification of the election result. To issue a writ under the facts before this court, would require redefining the term “recount”; or alternatively, compelling the auditor and canvassing board members to neglect their clear legal duty to amend election returns and arguably commit a criminal act.

**D. ZAPOTOCKY'S FAILURE TO UTILIZE THE PLAIN, SPEEDY AND ADEQUATE REMEDIES UNDER CHAPTER 29A.68 RCW IS A BAR TO ISSUING THE WRIT OF MANDATE.**

Zapotocky's Application for Writ, filed in Spokane County Superior Court on December 20, 2010, requested a hearing on December 29, 2010. (CP 1-7). It was filed 28 days after Certification of the race (CP 30).

The issuance of a Writ of Mandamus as previously noted, is an extraordinary remedy that ought to be granted only when there is no other plain, speedy, and adequate remedy. RCW 7.16.300.

Zapotocky claims she had no other plain, speedy, and adequate remedy at law to address the alleged misconduct under of Spokane County Auditor. (CP 1-3). The basis for her argument appears to be that she is not challenging the election results or claiming election fraud or error. Yet, the essence of her argument is that Spokane County Auditor intentionally or negligently failed to fulfill a duty. (CP 1-3).

Courts have long recognized "There exists a substantial public interest in the **finality** of **elections**, necessitating prompt challenges." *LaVergne v. Boysen*, 82 Wn.2d 718, 721, 513 P.2d 547, 549 (1973) *citing* *N.L.R.B. v. A. J. Tower Co.*, 329 U.S. 324, 331, 67 S.Ct. 324, 328, 91 L.Ed. 322 (1946). The Washington State legislature has recognized the public policy by requiring an application for a recount be filed within

three (3) business days after the county canvassing board declaration of the official results of the race in question RCW 29A.64.011. The legislature also placed clear limitations on the recount process and supporting the concept of finality of elections as reflected in the Note following RCW 29A.64.070 which reads as follows:

After the original count, canvass, and certification of results, the votes cast in any single precinct may not be recounted and the results recertified more than twice.

[2003 c 111 § 1607. Prior: 2001 c 225 § 9; 1991 c 90 § 3. Formerly RCW 29.64.051.]

**Notes:**

**Finding, purpose -- 1991 c 90:** "The legislature finds that it is in the public interest to determine the winner of close contests for elective offices as expeditiously and as accurately as possible. It is the purpose of this act to provide procedures which promote the prompt and accurate recounting of votes for elective offices and which provide closure to the recount process." [1991 c 90 § 1.]

(Emphasis added)

Zapotocky's had a plain, speedy, and adequate remedy available under chapter 29A.68 RCW at the time she was informed her request did not meet the requirements to conduct a recount. As previously addressed, Zapotocky claims Spokane County Auditor had a non-discretionary duty to conduct a recount in the manner she requested. When the Spokane County Auditor failed to fulfill the alleged duty, Zapotocky could have moved under RCW 29A.68.011 to compel the recount:

Any justice of the supreme court, judge of the court of appeals, or judge of the superior court in the proper county shall, by order, require any person charged with error, wrongful act, or neglect to forthwith correct the error, desist from the wrongful act, or perform the duty and to do as the court orders or to show cause forthwith why the error should not be corrected, the wrongful act desisted from, or the duty or order not performed, whenever it is made to appear to such justice or judge by affidavit of an elector that:

...

(5) Any neglect of duty on the part of an election officer . . . has occurred or is about to occur;

...

An affidavit of an elector . . . 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)

Spokane County Auditor provided Zapotocky additional time to submit an amended application for recount, notifying her she need to submit selected precincts that would allow the production of amended election returns. Zapotocky failed to submit a request upon which amended election returns could be generated. RCW 29A.68.011(5) clearly addresses Zapotocky's allegations, e.g. that Spokane County Auditor, an election officer, neglected in fulfilling her duty to process the recount application. Nonetheless, Zapotocky failed utilize the plain, speedy, adequate remedies available under RCW 29A.68.011 to have the court compel the Spokane County Auditor's to fulfill the neglected duty or show cause why.

To compel the Auditor to conduct a recount in the manner Zapotocky requests at this time amounts to an exercise in futility. There could be no official amended abstracts of vote produced or election results generated and the recount would not impact the official results (CP 32). The results of the election cannot be changed at this point.<sup>7</sup>

The law supports the finality of elections:

**29A.68.070 Misconduct of board - Irregularity material to result.**

No irregularity or improper conduct in the proceedings of any election 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 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.

(Emphasis added)

**29A.68.080 Misconduct of board — Number of votes affected — Enough to change result.**

When any election for an office exercised in and for a county is contested on account of any malconduct on the part of any election 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 in the remaining vote of the county.

(Emphasis added)

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<sup>7</sup> Incumbent's margin of votes far exceeded the number of ballots Zapotocky wanted recounted. (CP 30 & 38)

The courts have held a Writ of Mandate will not issue where the applicant does not timely pursue an appeal. *State ex rel. Brown v. Superior Court of Whatcom County*, 15 Wash. 314, 46 P. 232 (1896). Zapotocky failed to timely pursue plain, speedy, and adequate remedies ordinarily available under chapter 29A.68 RCW.

It would logically follow that the election is final and frankly, Zapotocky's Application moot. Zapotocky failed to utilize the plain, speedy, and adequate remedies available at the time of the election and her failure must bar the issuance of a writ at this time.

**E. ZAPOTOCKY IS NOT A BENEFICIALLY INTERESTED PARTY UNDER CHAPTER 7.16 RCW TO COMPEL A RECOUNT BECAUSE SHE NO LONGER HAS STANDING UNDER 29A.64.011.**

RCW 7.16.170 requires an Application for Writ of Mandamus be supported by an affidavit of a "party beneficially interested". *Retired Pub. Employees Council of Washington v. Charles*, 148 Wn.2d 602, 62 P.3d 470 (2003). A party is beneficially interested in an action if the party has an interest beyond that shared in common with other citizens. *Id. at 616*.

Spokane County Auditor stipulated at the trial court level, for purposes of the Summary Judgment Motion, that Zapotocky had standing, as a party official to submit a recount application in Spokane County's Auditor Contest, under RCW 29A.64.011(2). Zapotocky's does not deny that she

was not a party official at the time she filed for the Writ of Mandate. (CP 25; RP 12). Nor did Zapotocky apparently have support of the Party to pursue the present writ action. (CP 25). The provisions of RCW 29A.64.011(2) relating to credentials to request a recount clearly are for the benefit of the Party in partisan races.

Washington State no longer recognizes party affiliation in State and County elections<sup>8</sup>. Setting aside for purposes any issues concerning the constitutionality of granting a Party standing to request a recount in a County election, it is the Party that holds a beneficial interest expressed through a Party Official. Simply stated, Zapotocky's Affidavit fails to substantiate she is a "party beneficially interested" in this matter. Zapotocky is no longer a Party Official and does not have Official Party support. It stands to reason that she is bringing this action on her own behalf as a sole voter. In the capacity of a single voter, she neither meets the criteria to request a recount nor for issuance of a writ. Consequently, Zapotocky does not meet the requirements of Title 7.16 RCW as a person beneficially interested. Writ may not be issued.

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<sup>8</sup> Under *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) the U.S. Supreme Court upheld the rights for voters in Washington State to advance only the top two candidates and to do away with party affiliations in most election races.

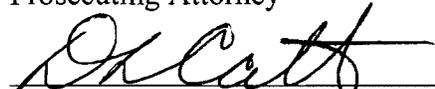
Mandamus will not lie to compel a vain or illegal act. *State ex rel. Osborne, Tremper & Co. v. Nichols*, 38 Wash. 309, 80 P. 462 (1905); *Hindman v. Great W. Coal Dev. & Min. Co.*, 46 Wash. 317, 89 P. 894 (1907); *State ex rel. City of Tacoma v. Rogers*, 32 Wn.2d 729, 203 P.2d 325 (1949).

**V. CONCLUSION**

Spokane County requests that the Court affirm the trial court's summary dismissal for the reasons set forth above.

Respectfully submitted this 14<sup>th</sup> day of September, 2011.

STEVEN J. TUCKER  
Prosecuting Attorney



Dan L Catt, WSBA# 11606

Deputy Prosecuting Attorney

Attorneys for Spokane County Auditor Spokane County

**DECLARATION OF SERVICE**

On the 14<sup>th</sup> day of September, 2011, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Stephen Pidgeon	<input type="checkbox"/>	Personal Service
Attorney at Law	<input checked="" type="checkbox"/>	U.S. Mail
3002 Colby Avenue, Suite 306	<input type="checkbox"/>	Hand-Delivered
Everett, Washington 98201	<input type="checkbox"/>	Overnight Mail
Attorney for Plaintiff	<input type="checkbox"/>	Facsimile

*I hereby declare under the penalty of perjury and the laws of the State of Washington that the above statements are true.*

Date: 9/14/11 Place: Spokane, WA

  
(Signature)