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Supreme Court No: 97305-9
Okanogan Co. Sup. Ct. Cause No.: 19-2-00178-24

**IN THE SUPREME COURT OF
THE STATE OF WASHINGTON**

In Re:

The Matter of Recall Charges Against Jill Ritter,
City Council Member of the City of Tonasket

APPELLANT'S BRIEF

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A. INTRODUCTION

Ms. Brenda Jones, Petitioner-Appellant, was one of two registered voters residing within the City of Tonasket, who filed the Recall Petition in this matter. She seeks a determination by this Court of the legal and factual sufficiency of her Petition.

The Okanogan County Superior Court permitted and considered extensive factual submissions from Ms. Ritter and other witnesses, ultimately denying the Petition.

B. ASSIGNMENT OF ERROR AND ISSUES FOR REVIEW

1. Whether the Superior Court erred in exceeding its limited factfinding functions, if any, under RCW 29A.56.140; and
2. Whether the recall charges, accepted as true, establish a legal and factual basis for recall.

C. STATEMENT OF THE CASE

The relevant facts are brief. On May 1, 2019, Appellant filed a recall petition against Jill Ritter, city council member for the City of Tonasket. *See Clerk's Papers* ("CP") at 100. As per the statutory procedure in Chapter 29A.56, the matter was set for hearing to determine the sufficiency of the allegations. *Id.* at 112. On May 15, 2019, the sufficiency hearing was held. *See Report of Proceedings* ("RP").

At the sufficiency hearing, the Trial Court, over Counsel's argument, considered responsive documents and testimony from the Respondent, as well as argument on disputed facts. This error was present from the inception of the proceeding:

THE COURT: And it's helpful from the Court's perspective if you want to address anything or reference anything, I have prepared for myself, individual charts as to each charge. I have the opportunity to make notes as to the petitioner's position, **respondent's position** and any other notes that I might make, as such. So, that's helpful.

RP at 8:6-11 (emphasis added). This error was called to the Court's attention with Counsel's opening words:

MR. CHASE: Thank you, Your Honor. So, the legal standard here is very, very straightforward, Your Honor. The first thing is **the Court here functions as a gateway. The Court is to assume that the allegations are factually true** in evaluating the petitioners here today.

RP at 10:15-19 (emphasis added). Following Counsel's argument on the sufficiency of the charges, the Court allowed a response:

THE COURT: [...] With respect to the recall of Jill Ritter then I'll turn to Mr. Crandall for response to requests here.

RP at 29:19-22. Mr. Crandall (Counsel for Ms. Ritter), delivered argument on the legal and factual sufficiency of the charges. *Id. et seq.* However, he also referenced factual declarations¹ filed by Ms. Ritter and other third party

¹ There are references in the Report of Proceedings to other "declarations" submitted by the Petitioner. There is a critical distinction – Ms. Ritter's impermissible declarations were

witnesses. *RP* at 36:18-20 (declaration of Mr. Howe, City Attorney); *Id.* at 40:10 (Ms. Ritter's declaration).

Counsel for Ms. Jones reminded the Court of the duty to assume the petition's allegations as true via a memorandum of law filed before the hearing. *See CP* at 10-12. During the hearing, Counsel argued this point several times. *RP* at 10:19; 14:17-18; 24:13-15; 26:5-7; 27:8-9; 29:4-7; 42:24-43:3. One particular exchange highlights the separation of powers issue lurking here:

[MR. CHASE] ... Also, I'll point out that Officer Cruz's declaration states that she said it was his relative. Again, **the facts here are not what we're supposed to be disputing.** The facts are is this factually sufficient. The veracity, the truthfulness of these facts, those are true. That's the Court's review. **They are assumed true.** Opposing counsel's argument is attempting to argue what is not the actual law for this type of case.

THE COURT: No, I'm trying to get --- you say they're true and **I have a response that says there's not a relative and somebody saying that this person is a relative** and yet, we have the individual ---

MR. CHASE: Again, Your Honor, that ---

THE COURT: **Have to sort that ---**

filed as such *into the court's record as substantive pleadings* by Ms. Ritter and her witnesses. The reference to the Petitioner's "declarations" is shorthand for the sworn affidavits filed *as part of the recall petition itself* and as permitted by *In re Recall of Kast*, 144 Wn.2d 807, 813, 31 P.3d 677 (2001). Those proper supporting affidavits are those beginning at *CP* 24 (Jones), 54 (MacGregor-Foreman), 63 (Perez), 77 (Cruz), 85 (Odegaard), and 92 (Wilson).

MR. CHASE: **That's not the Court's responsibility** today. **That is the voter's responsibility.** The Court is to take what is true and I can provide Your Honor with numerous case law that is binding on this Court to state that the Court takes the petitioner's assertions as true. **The Court is evaluating whether or not those are factually sufficient, not that they're truthful.** That's not the Court's role...

RP at 42:23-43:19 (emphasis added).

On May 22, 2019, the Court issued its decision, incorporating some of the Respondent's factual assertions, documentary evidence, and even the declarations of third parties. *CP* at 1-9. The Court's ruling acknowledged that the Court considered the factual response. *CP* at 5 (Ms. Ritter's Declaration); *CP* at 6 (Mr. Howe's Declaration).

Ms. Jones Appeals, arguing that the trial court erred in exceeding its factfinding function under the recall petition statutes and seeking a determination of the sufficiency of the charges.

D. ARGUMENT & AUTHORITY

1. The Trial Court Exceeded its Authority

Under RCW 29A.56.140, the trial court "shall not consider the truth of the charges, but only their sufficiency." This statute provides for a "highly limited" role for Courts in the recall process. *Recall of West*, 155 Wn.2d 659, 662, 121 P.3d 1190 (2005).

The courts do not evaluate the truthfulness of a petitioner's charges, instead considering only whether the charges are both factually and legally sufficient. Therefore, courts must

determine ‘whether, accepting the allegations as true, the charges on their fact support the conclusion that the officer abused his or her position.’

Recall of Bolt, 117 Wn.2d 168, 173-74, 298 P.3d 170 (2013) (citing *Recall of Wasson*, 149 Wn.2d 787, 792, 72 P.3d 170 (2003)).

This Court’s prior decisions indicate that the trial court may draw limited *conclusions* from facts², but that “it is the voters, not the courts, who will ultimately act as the fact finders.” *Recall of Pepper*, 189 Wn.2d 546, 554, 403 P.3d 839 (2017). This, along with the unusually specific statutory language in RCW 29A.56.110 (“The court shall not consider the truth of the charges, but only their sufficiency.”) extinguishes all factfinding³ power.

Here, the Court observed that there were disputed facts, considered factual submissions by the Respondent (*See e.g. CP* at 5), and even made a *sub rosa* credibility determination by way of noting the absence of certain facts in the record (*See Id.* at 7). These are all functions reserved for the voters; the Court’s analysis should have begun with a stronger presumption than even “light most favorable.” The Court was required to “accept[] the allegations as true...” *Recall of Pepper*, 189 Wn.2d at 555. The trial court

² Subject to review under the substantial evidence standard, unlike the remainder of the alleged facts, which are subject to *de novo* review.

³ *Cole v. Webster*, 103 Wn.2d 280, 692 P.2d 799 (1984) suggests that the court may *voir dire* the Petitioner as to their basis of knowledge, but no further. *Id.* at 288. This underscores Ms. Jones’ argument herein – the scope of any factfinding power is so limited that the trial court overstepped in this case.

exceeded its gatekeeping function. The purpose of the factual sufficiency requirement is to avoid frivolous or unsubstantiated petitions – meaning that the charges must be substantiated by *identifiable* facts. *Recall of Beasley*, 128 Wn.2d 419, 424-25, 908 P.2d 878 (1996). It is for the voters to decide if the identified facts are *disputed*, and to resolve the same by voting.

This is the reason the Appellant highlighted the exchange at *RP* at 42:23-43:19 above. It may well be that the Petitioner is incorrect about a familial relationship between Ms. Ritter and Mr. McDaniel. If so, this is likely an argument that Ms. Ritter should raise to the public and in her response per RCW 29A.56.140. But this rebuttal should not be raised to the Superior Court. This demonstrates clear error at the Superior Court level.

The recall statutes are set up to avoid litigating factual disputes in Superior Court:

Both persons may appear with counsel. The court may hear arguments as to the sufficiency of the charges and the adequacy of the ballot synopsis. The court shall not consider the truth of the charges, but only their sufficiency.

RCW 29A.56.140. This statute does not provide for responsive *factual* pleadings before Superior Court – only argument as to the sufficiency determination. Thus, to the extent the trial court admitted and considered a factual response, this was error. To be clear, the Appellant’s argument is not

that no pleadings could be filed – merely that such pleadings are limited to legal issues.

The Respondent's *factual* response is provided for in RCW 29A.56.220 and this response is filed *after* the date for the recall election has been set. *See* RCW 29A.56.220. The response is then tendered directly to the voters, not to the Court, by printing it on the ballots. RCW 29A.56.250.

2. The Charges, Taken as True, were Sufficient

The Supreme Court reviews recall petitions using the same criteria as the Superior Court. *Recall of Beasley*, 128 Wn.2d at 424 (citing *In re Shipman*, 125 Wn.2d 683, 684, 886 P.2d 1127 (1995)). While review is *de novo*, the trial court's factual conclusions are affirmed on a substantial evidence standard. *Recall of Pepper*, 189 Wn.2d at 554.

But here, the Appellant argues that the review must be nearly entirely *de novo* because the trial court's factual conclusions were tainted by the admission of improper evidence that should not have been considered.

Regardless, Ms. Jones stands on the factual allegations in the initial Recall Petition (*CP* at 16-97) and the arguments of counsel at the sufficiency hearing; the record cannot be expanded on appeal.

E. CONCLUSION

The trial court erred because it exceeded its authority. The recall statutes are set up to avoid this very situation – where disputed facts are litigated in Superior Court. It is the purview of the voters, not the court, to decide whether the facts are accurate. Disputed facts may be a powerful rebuttal in the public sphere before the factfinding voters, but there can be no litigation of these issues in the gatekeeping sufficiency hearing before Superior Court.

Ms. Jones submits that the allegations in the recall petition, taken as true, are legally and factually sufficient to permit the recall to proceed. The Court should not consider the factual response of the public officials or other witnesses – this is the factfinding function of the public. To consider such responses at the judicial gatekeeping stage works an impermissible judicial intrusion into voting – the most cherished of fundamental rights reserved to the people.

For the foregoing reasons, Ms. Jones requests that this Court determine the sufficiency of the Recall Petition.

Respectfully submitted this 26 of June, 2019.



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