

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CHELAN

TIMOTHY BORDERS, et al.,

Petitioners,

v.

KING COUNTY AND DEAN LOGAN, its
Director of Records, Elections and Licensing
Services, et al.,

Respondents,

v.

WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE,

Intervenor-Respondent,

v.

LIBERTARIAN PARTY OF WASHINGTON
STATE, et al.,

Intervenor-Respondents.

No. 05-2-00027-3

PETITIONERS' BRIEF IN
RESPONSE TO WSDCC'S
MOTION ON DUAL VOTES

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INTRODUCTION

WSDCC's motion presents two issues, one procedural and one substantive. The procedural issue is whether questions relating to voters who voted more than once should be resolved in the course of the trial or by this motion. The substantive issue is whether those who cast multiple ballots should have any of their votes counted. We address each issue in turn.

I. THE QUESTION OF MULTIPLE VOTERS SHOULD BE RESOLVED AT TRIAL

A. WSDCC Has Not Complied with Civil Rule 56(c).

Civil Rule 56(c) provides:

The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served *not later than 28 calendar days before the hearing*. . . .
Summary judgment motions shall be heard *more than 14 calendar days before the date set for trial* unless leave of court is granted to allow otherwise. . . .

(emphasis added). WSDCC noted this motion for May 23, the first day of trial, 10 days after it served and filed the motion. As far as Petitioners know, WSDCC has not obtained leave of court to proceed in this manner.

The purpose of summary judgment motions is to resolve issues in advance of trial. The timing requirements of Rule 56(c) recognize that the policy of judicial economy embodied in summary judgment practice is not served when summary judgment motions are decided during or on the eve of trial. WSDCC's motion is not timely.

1 **B. Petitioners are Awaiting King County’s Production of the Evidence**
2 **Relating to Multiple Voters.**

3 WSDCC’s motion claims that “Petitioners lack the requisite proof” of voters who
4 cast multiple votes and that Petitioners’ claims relating to multiple voters should be
5 dismissed as a result. WSDCC Motion at 1-2, 7-8. Such an argument is inappropriate in
6 light of Petitioners’ pending requests for the relevant evidence. The facts are as follows:

- 7 • On April 13, 2005, WSDCC filed a motion *in limine* to exclude evidence of
8 “voter crediting” and to require that Petitioners introduce signed poll book
9 pages, returned absentee ballot envelopes, and provisional ballot envelopes
10 as the best evidence that an individual voted in the 2004 general election.
- 11 • On April 18, 2005, the earliest date permitted by the Court, Petitioners
12 questioned Dean Logan, Director of King County Records, Elections and
13 Licensing Services (“King County REALS”), about a spreadsheet
14 Petitioners had received from King County in February 2005 (the “348
15 Spreadsheet”). Mr. Logan was unable to explain the 348 Spreadsheet. At
16 the conclusion of Mr. Logan’s deposition, King County REALS produced a
17 second spreadsheet (the “437 Spreadsheet”).
- 18 • On April 21, 2005, Petitioners questioned Bill Huennekens, Elections
19 Superintendent of King County REALS, regarding both the 348
20 Spreadsheet and the 437 Spreadsheet. Mr. Huennekens could not explain
21 the spreadsheets with certainty, but his testimony was Petitioners’ first
22 indication that the spreadsheets reflected voters who had cast multiple
23 ballots.

- 1 • On April 29, 2005, in light of the pending motion on voter crediting, and in
2 light of the Huennekens deposition, petitioners issued a subpoena to King
3 County REALS. The subpoena requested all poll book pages, returned
4 absentee ballot envelopes, and provisional ballot envelopes for voters
5 suspected of having cast multiple ballots in the 2004 election. The 348
6 Spreadsheet suggested that approximately 2-3 dozen individuals in King
7 County had cast such ballots. King County REALS was required to
8 produce these documents by May 6, 2005.
- 9 • On May 2, this Court granted WSDCC's motion with respect to voter
10 crediting.
- 11 • On May 3, 2005, at the request of the representative for King County
12 REALS, Petitioners re-served the April 29, 2005 subpoena.
- 13 • On May 5, Petitioners deposed Colleen Kwan, an employee of King County
14 REALS, who was responsible for preparing the 348 Spreadsheet and the
15 437 Spreadsheet. Upon being questioned regarding the spreadsheets,
16 Ms. Kwan interpreted them and testified that they reflected a number of
17 voters—many more than King County had previously disclosed—whom
18 King County had identified as having had both (1) provisional ballots
19 counted and (2) additional votes counted via voting at the poll, via an
20 absentee ballot, or via another provisional ballot.
- 21 • On May 10, based upon Ms. Kwan's disclosure of the methodology that
22 King County used to identify dual voters, Petitioners issued a subpoena to
23 King County, requesting all poll book pages, returned absentee ballot

1 envelopes, and provisional ballot envelopes for 129 individuals believed to
2 have cast more than one ballot.

- 3 • On May 11, 2005, Petitioners issued a 30(b)(6) notice to King County,
4 asking that the county produce a witness for deposition on May 19, 2005 to
5 be deposed on the subject of “the number of provisional ballots that King
6 County determined were cast by persons who cast more than one ballot.”
- 7 • On at least two occasions during the week of May 9, 2005, counsel for
8 Petitioners asked counsel for King County REALS about the status of the
9 April 29 subpoena and was told that King County REALS was working on
10 a response and that counsel did not yet have an estimated time when the
11 response would be provided.
- 12 • On May 16, 2005, counsel for Petitioners and King County REALS met and
13 conferred with respect to outstanding discovery requests, including those
14 relating to the voters who had cast more than one ballot. Petitioners offered
15 to provide King County REALS with people to assist with gathering and
16 copying the responsive documents. Counsel for King County REALS
17 stated that King County REALS could not promise to produce responsive
18 documents prior to the close of discovery.
- 19 • With little time before trial, and in the absence of any alternative, on
20 May 16, 2005, Petitioners filed a Motion to Compel with the Court, seeking
21 an Order compelling King County to immediately comply with Petitioners’
22 April 29 subpoena.

- 1 • On May 17, 2005, counsel for King County REALS stated that King
2 County would produce some responsive documents on May 18, but could
3 not promise that it would provide all responsive documents prior to the
4 close of discovery.
- 5 • Today, May 18, 2005, King County REALS did produce approximately 85
6 records responsive to the April 29 subpoena. Only two of those records,
7 however, concern the issue of multiple voters. Thus, Petitioners still await
8 production by King County REALS of nearly all of the documents
9 concerning multiple voters that were requested in the subpoenas of April 29
10 and May 10. The 30(b)(6) deposition relating to this subject is scheduled
11 for May 19, 2005.

12 Declaration of David Bowman ¶¶ 1-12; Declaration of Robert Maguire ¶¶ 1-4.

13 Petitioners expect the documents received in response to the pending subpoenas
14 will establish that some or all of the individuals identified in the subpoenas and the Kwan
15 Deposition voted more than once in the 2004 General Election.

16 Pursuant to Civil Rule 56(f), a motion for summary judgment should be denied or
17 continued when the party opposing the motion relies on information that it has sought in
18 pending discovery requests, but which has not yet been produced. *Tellevik v. Real*
19 *Property Known as 31641 West Rutherford Street*, 120 Wn.2d 68, 91 (1992), *clarified in*
20 *other respects on rehearing*, 845 P.2d 1325 (1993). Here, Petitioners received the first
21 indication that the spreadsheets set forth data regarding persons who were likely to have
22 cast multiple ballots in the deposition of Mr. Huennekens on April 21. The spreadsheets
23 were explained clearly for the first time—and the existence of many more multiple voters

1 than had been suspected first revealed—in the deposition of Ms. Kwan on May 5, less than
2 two weeks ago. Petitioners have moved promptly to seek the relevant evidence supporting
3 the spreadsheets from King County REALS and are presently waiting to receive this
4 evidence from King County REALS.

5 In light of the fact that Rules 56(c) and 56(f) would call for continuing WSDCC’s
6 motion in any event, and in light of the fact that trial commences on Monday, the most
7 efficient resolution of this issue is (1) to require King County REALS to respond to the
8 pending subpoenas and 30(b)(6) notice and (2) to then permit Petitioners to present the
9 evidence thus received at trial.

10 **II. THE REMEDY FOR CASTING ILLEGAL MULTIPLE VOTES IS TO**
11 **INVALIDATE ALL SUCH VOTES**

12 **A. When a Voter Casts Multiple Votes, All Such Votes Are Illegal.**

13 RCW 29A.68.020(5)(a) provides:

14 (a) Illegal votes¹ include but are not limited to the
following:

15 (i) More than one vote cast by a single voter;

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17 WSDCC would read clause (i) to say “[*The second vote cast when there has been*] more
18 than one vote cast by a single voter.” That, however, is not what the statute says. The
19 statute describes scenarios where illegal votes are cast. One of those scenarios is the case
20 of an individual who casts more than one vote. The term “illegal votes” is properly
21 understood as referring to all of the votes cast by that individual.

22 ¹ WSDCC’s motion, in quoting the statute, omits the “s” at the end of this word. WSDCC
23 Motion at 5.

1 The act of casting multiple votes is a crime, punishable by imprisonment of not
2 more than one year and a fine of not more than \$5,000. RCW 9A.20.021(2); RCW
3 29A.84.650. When a voter casts two votes, each of those votes is an element of that crime.
4 Each such vote is, therefore, an illegal vote. Accordingly, the appropriate remedy when
5 courts in election contests confront two ballots cast by the same voter is to disqualify both
6 ballots.²

7 WSDCC contends that RCW 29A.84.650 supports its interpretation that only the
8 second ballot cast by a single voter should count as an illegal vote because “[t]he
9 punishment for casting more than one ballot is not for the person’s initial vote to be
10 declared unlawful, but for the individual ‘dual voter’ to be subjected to imprisonment for
11 up to one year.” WSDCC Motion at 6. This argument proves too much, for RCW
12 29A.84.650 does not address disqualifying the second vote either, yet WSDCC concedes
13 that at least that vote should be rejected. WSDCC Motion at 1. RCW 29A.84.650 is
14 within the chapter discussing crimes associated with illegal voting; it does not purport to

15 ² See, e.g., *Tate-Smith v. Cupples*, 134 S.W.3d 535, 544 (Ark. 2003) (“we hold that the trial
16 court did not abuse its discretion in ruling that Mr. Lewis voted twice and that Mr. Lewis’s
17 votes for appellant should be excluded”); *Bernardo v. Rue*, 146 P. 79, 81 (Cal. App. 1914);
18 *In re Paikuli*, 8 Haw. 680, 1890 WL 1182 (1890) at *3 (“If two ballots are found enfolded,
19 the voter is not allowed to select one of them and cast it, but the law prescribes that his
20 vote shall be rejected.”); *Kreitz v. Behrensmeyer*, 17 N.E. 232, 248-49 (Ill. 1888) (“The
21 court refused to count either of such ballots; and this we think was right.”); *Lisk v.*
22 *Benjamin*, 433 N.E.2d 1154, 1157 (Ill. App. 1982) (“When a voter has voted more than
23 once in the same election all of his ballots must be rejected.”); *Wright v. Gettinger*, 428
N.E.2d 1212, 1224 (Ind. 1981) (invalidating all votes cast by voters who punched straight
party tickets for multiple parties); *Otworth v. Bays*, 98 N.E.2d 812, 814-15 (Ohio 1951);
State ex rel. Guernsey v. Meilike, 51 N.W. 875, 876 (Wis. 1892) (“According to their
understanding, that these two votes were folded together and cast by the same person, they
should have destroyed both of them, and not have counted either.”). Even though the
statutory language in the cases cited varies, the cases reflect a common understanding that
when a voter casts two votes, both votes are to be disqualified.

1 address the impact of illegal votes on election contests. RCW 29A.68.020(5)(a)(i)
2 addresses that subject, and provides that such votes are illegal votes.³

3 Nor does RCW 29A.44.090 support WSDCC's argument. That statute merely sets
4 forth a procedure to be followed at the polls to prevent the casting of multiple ballots in
5 advance. It does not address the impact of multiple votes discovered after the fact during
6 an election contest. Again, RCW 29A.68.020(5)(a)(i) covers that scenario.

7 **B. Washington Does Not Permit Multi-State Voters.**

8 According to WSDCC:

9 [N]othing in Washington's election contest statute provides
10 that an "illegal vote" includes a vote by a person who cast
11 only one ballot in Washington, but who also cast a ballot in
12 another state's election. Although such a "dual vote" would
13 have implications in an election for nation-wide office such
14 as the President, it has no impact on an election for state-
15 wide office such as the Office of Governor. By definition, if
16 the person cast a ballot in Washington and another ballot in,
17 say, Oregon, the person could not have cast "more than one
18 ballot" for the Office of Governor of Washington.

14 WSDCC Motion at 7. Of course, the same logic would permit a voter to cast votes in
15 multiple counties in Washington, or multiple cities within a single county, so long as the
16 voter was careful not to vote twice for the same office. WSDCC cites no authority for the
17 remarkable proposition that a voter could have spent election day traveling from The
18 Dalles, Oregon to Yakima to Cashmere to Wenatchee, casting ballots in each city along the
19 way. And for good reason: the law does not permit such a practice. Different polling
20 places notwithstanding, such a voter would still be casting multiple votes in the same
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22 ³ WSDCC's argument that the first ballot should be counted and the second ballot
23 invalidated presents a practical problem as well. If, for example, a voter mails in an
absentee ballot on the day of the election and votes at the polling place on the same day,
how does one determine which is the first ballot?

1 general election, *see* RCW 29A.04.073 (defining “general election” as “an election
2 required to be held on a fixed date recurring at regular intervals”), which is a crime. *See*
3 RCW 29A.84.650 (“Any person who votes or attempts to vote more than once at any
4 primary or general or special election is guilty of a gross misdemeanor.”). The multiple
5 votes cast by that voter are illegal votes under RCW 29A.68.020(5)(a)(i).

6 **C. This Court Has Already Held That Petitioners Were Not Required to**
7 **Challenge Multiple Voters Prior to or on Election Day.**

8 WSDCC contends that “Petitioners were required to challenge the registration of
9 any dual multi-state voters prior to or on election day under RCW 29A.08.810 and RCW
10 29A.08.820.” WSDCC Motion at 7. On February 4, 2005, however, this Court held:

11 The Court, however, believes that the only reasonable
12 interpretation of section (5)(a) and (5)(b) of 29A.68.020 is
13 that such a challenge as provided by 29A.08.810 and
14 29A.08.820 does not pertain to, nor exclude from
consideration in an election contest those references in
subsection (5)(a)(i) and (ii), that is, *more than one vote cast*
by a single voter and/or votes cast by persons disqualified
under Article VI, Section 3.

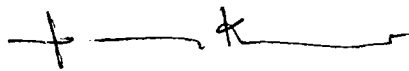
15 Verbatim Report of Proceedings, Court’s Oral Decision (Feb. 4, 2005) at 22 (emphasis
16 added).

17 **CONCLUSION**

18 For the reasons stated above, WSDCC’s Motion should be denied.

19 RESPECTFULLY SUBMITTED this 18th day of May, 2005.

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22 By 
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