

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Case Type: Civil Other/Misc.

Julie Quist, [REDACTED] [REDACTED] and Lisa Kaiser,

Court File No.: 62-CV-20-5598

Contestants,

vs.

**ORDER GRANTING
CONTESTEES' MOTIONS
TO DISMISS**

Steve Simon, only in his official capacity as
the Minnesota Secretary of State, and Tina
Smith, Senate candidate,

Contestees.

Considered and decided by Reilly, Presiding Judge; Frisch, Judge; and Worke,
Judge.

BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND BECAUSE:

1. On November 3, 2020, the State of Minnesota held a general election, including an election for the office of United States Senator. Contestee Senator Tina Smith appeared on the ballot as the Democratic-Farmer-Labor Party (DFL) candidate for senator. Senator Smith prevailed in Minnesota's United States Senate race with 168,377 more votes than the nearest candidate. Contestee Minnesota Secretary of State Steve Simon was not up for reelection and thus did not appear on the ballot. On November 24, 2020, Secretary Simon certified Minnesota's 2020 general election results by filing the canvass report assembled by the State Canvassing Board. This report included the statewide election results for United States Senator.

2. On December 1, 2020, contestant-voters Julie Quist, [REDACTED] [REDACTED] and Lisa Kaiser filed a notice of election contest under Minn. Stat. §§ 209.01-.12 (2018) in Ramsey County District Court. In the notice, contestants alleged irregularities and concerns “related to the lack of transparency, procedures, observers, and election judge access, voter intimidation, lost ballots, lost absentee envelopes, missing election materials, . . . questionable ballots[,] concerns about voting equipment,” and the untimely delivery of a Dominion voting machine.

3. On December 4, 2020, Secretary Simon moved to dismiss the notice of contest pursuant to Minn. R. Civ. P. 12.02(a).

4. On December 7, 2020, the Minnesota Supreme Court assigned the matter to a three-judge panel (the Panel).

5. On December 8, 2020, Senator Smith moved to dismiss the notice of contest pursuant to Minn. R. Civ. P. 12.02.

6. On December 17, 2020, the Panel issued an Order setting a briefing schedule. Pursuant to the parties’ request, the Order instructed contestants to file responsive memoranda by December 22, 2020, and contestees to file replies by December 24, 2020. Following the receipt of the parties’ respective memoranda, the matter was submitted for consideration by the Panel.

7. We first consider Secretary Simon’s motion. Secretary Simon claims that this court lacks subject-matter jurisdiction under rule 12.02(a), and thus the contest must be dismissed as to him. An election contest is an adversarial proceeding governed by the Minnesota Rules of Civil Procedure “so far as practicable.” Minn. Stat. § 209.065. Under

rule 12, a court may dismiss an action for lack of subject-matter jurisdiction. Minn. R. Civ. P. 12.02(a). “Subject-matter jurisdiction is the court’s authority to hear the type of dispute at issue and to grant the type of relief sought.” *Seehus v. Bor-Son Constr., Inc.*, 783 N.W.2d 144, 147 (Minn. 2010).

8. Whether a particular court has subject-matter jurisdiction depends on whether the court has the statutory and constitutional power to adjudicate the case. *Zweber v. Credit River Twp.*, 882 N.W.2d 605, 608 (Minn. 2016). Minnesota courts have subject-matter jurisdiction over election contests solely through statute. *Moulton v. Newton*, 144 N.W.2d 706, 710 (Minn. 1966) (“We have consistently held that the jurisdiction of the court in an election contest is solely statutory.”); *see generally* Minn. Stat. §§ 209.01-.12. “[A]bsent statutory compliance, courts are powerless to entertain such proceedings.” *Christenson v. Allen*, 119 N.W.2d 35, 38 (Minn. 1963). When a statute is unambiguous on its face, courts apply the plain meaning of the statutory text. *KSTP-TV v. Ramsey County*, 806 N.W.2d 785, 788 (Minn. 2011).

9. The jurisdiction statutorily conferred to Minnesota courts to hear election contests arises when a contestant challenges either

(1) the nomination or election of any person for whom the voter had the right to vote if that person is declared nominated or elected to the senate or the house of representatives of the United States, or to a statewide, county, legislative, municipal, school, or district court office; or (2) the declared result of a constitutional amendment or other question voted upon at an election.

Minn. Stat. § 209.02, subd. 1. Contests may be brought over (1) “an irregularity in the conduct of an election or canvass of votes,” (2) “the question of who received the largest

number of votes legally cast,” (3) the question of “the number of votes legally cast in favor of or against a question,” or (4) “on the grounds of deliberate, serious, and material violations of the Minnesota Election Law.” *Id.*

10. The proper contestee named in a given challenge depends upon the type of contest. Minn. Stat. § 209.021, subd. 3. In all contests challenging the nomination or election of a candidate, including a candidate for the United States Senate, the successful candidate is the contestee. *Id.* And in contests challenging a constitutional amendment, “the secretary of state . . . is the contestee.” *Id.* Thus, two scenarios exist under Minnesota law when a secretary of state may be properly named as a contestee: (1) when a contestant challenges the nomination or election of the secretary of state, and (2) when a contestant challenges a constitutional amendment. *Id.*

11. With respect to Secretary Simon, contestants filed a notice of election contest naming him as a contestee in his official capacity as Secretary of State. Secretary Simon was not up for reelection and a constitutional amendment was not on the ballot in the November 2020 general election. Thus, this election contest challenges neither Secretary Simon’s election nor a constitutional amendment. As such, Secretary Simon is not a properly named contestee within the strict jurisdictional boundaries established by Minnesota law. This court therefore lacks subject-matter jurisdiction over Secretary Simon. As a result, we grant Secretary Simon’s motion to dismiss with prejudice.

12. We next consider Senator Smith’s motion. Senator Smith claims that (1) the court lacks jurisdiction because contestants failed to properly serve Senator Smith, and (2) the notice of contest fails to state a claim upon which relief may be granted because the

allegations do not indicate that any irregularities in the election process altered the outcome of the election.

13. Courts may dismiss an action for failure to state a claim upon which relief may be granted. Minn. R. Civ. P. 12.02(e). In considering such a motion to dismiss, the question is “whether the complaint sets forth a legally sufficient claim for relief.” *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008). In determining whether the complaint sets forth a legally sufficient claim for relief, courts accept the facts alleged in the complaint as true and “construe all reasonable inferences in favor of the nonmoving party.” *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). But mere conclusory statements are insufficient to set forth a legally sufficient claim for relief. *Hebert*, 744 N.W.2d at 235. “A claim is sufficient against a motion to dismiss for failure to state a claim if it is possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded.” *Walsh v. U.S. Bank*, 851 N.W.2d 598, 603 (Minn. 2014).

14. Senator Smith first argues that this court should grant her motion to dismiss because contestants failed to properly serve her. The statutory provisions relating to the filing and serving of notice of contest must be strictly followed to permit a court to acquire jurisdiction. *Lebens v. Harbeck*, 243 N.W.2d 128, 129 (Minn. 1976). “[N]otice must be served and filed . . . within seven days after the canvass is completed in the case of a . . . general election.” Minn. Stat. § 209.021, subd. 1. “In all contests relating to the . . . election of a candidate, the notice of contest must be served on the candidate . . . [and] a copy of the notice must be sent to the [candidate]’s last known address by certified mail

...” *Id.*, subd. 3. If personal service cannot be made, “an affidavit of the attempt by the person attempting to make service and the affidavit of the person who sent a copy of the notice . . . by certified mail is sufficient to confer jurisdiction upon the court to decide the contest.” *Id.*

15. Here, on November 24, 2020, the State Canvassing Board completed its canvass, and Secretary Simon certified that Senator Tina Smith received 168,377 more votes than her nearest opponent. Pursuant to Minn. Stat. § 209.021, subd. 1, contestants’ deadline to file and serve the notice on Senator Smith was December 1, 2020, seven days after November 24. On December 7, 2020, contestants filed an affidavit of attempted service, wherein contestants’ attorney declared that she attempted personal service upon Senator Smith on December 1, 2020. Unsuccessful in her attempt to personally serve Senator Smith by December 1, 2020, contestants’ attorney declared that she mailed Senator Smith a certified letter to the only address that she could identify. While contestants’ attorney’s declaration is vague as to when the certified mail was actually sent, and therefore unclear as to whether certified mail was actually timely sent, we will exercise jurisdiction for purposes of this motion to dismiss without resolving the ultimate question of whether contestants complied with the service requirement.

16. Senator Smith also argues that, pursuant to *Pearson v. Chmielewski*, 183 N.W.2d 566 (Minn. 1971), this court lacks jurisdiction because the affidavit of attempted service was not filed within the statutory time period. But in *Pearson*, which involved an earlier version of the applicable statute, the absence of jurisdiction was predicated on the undisputed fact that service did not occur until three days after the expiration of the time

provided by statute. *Pearson*, 183 N.W.2d at 568. And the current version of the statute, Minn. Stat. § 209.021, subd. 3, contains no requirement that the affidavit of attempted service be filed within a particular time period in order to confer jurisdiction.

17. Senator Smith next argues that this court should grant her motion to dismiss because contestants failed to sufficiently plead grounds for contest. Chapter 209 sets forth the narrow circumstances under which courts have jurisdiction to hear an election contest. *See generally* Minn. Stat. §§ 209.01-.12. The circumstances which fall within a court’s jurisdiction include a challenge to “(1) the . . . election of any person for whom the voter had the right to vote if that person is declared . . . elected to the senate or the house of representatives of the United States . . . ; or (2) the declared result of a constitutional amendment or other question voted upon at an election.” Minn. Stat. § 209.02, subd. 1.

The contest may be brought over an irregularity in the conduct of an election or canvass of votes, over the question of who received the largest number of votes legally cast, over the number of votes legally cast in favor of or against a question, or on the grounds of deliberate, serious, and material violations of the Minnesota Election Law.

Id.

18. Here, contestants brought the notice of contest (1) over “irregularities in the conduct of the election and the canvass of votes,” (2) “over the question of who received the largest number of votes legally cast,” and (3) “on the grounds of deliberate, serious, and material violations of the Minnesota Election Law.”

19. “When a contest relates to the office of senator or a member of the house of representatives of the United States, the *only* question to be decided by the court is which

party to the contest received the highest number of votes legally cast” Minn. Stat. § 209.12 (emphasis added). While

[e]vidence on any other points specified in the notice of contest, including . . . the question of . . . deliberate, serious, and material violation of the provisions of the Minnesota Election Law, must be taken and preserved by the [court] trying the contest, . . . the [court] shall make no findings or conclusion on those points.

Id. Thus, the only issue that this court may adjudicate in this contest as it relates to Senator Smith is whether Senator Smith received the highest number of votes legally cast.

20. “The State Canvassing Board’s certification is prima facie evidence that . . . the contestee[] has been elected to the office.” *Sheehan v. Franken (In re Contest of Gen. Election Held on Nov. 4, 2008)*, 767 N.W.2d 453, 458 (Minn. 2009). Contestants bear the burden of proving that the State Canvassing Board’s certification was “in error.” *Id.* If contestants seek to meet this burden by alleging irregularities in the election process, they must also allege that irregularities changed the outcome of the election. *See Hancock v. Lewis*, 122 N.W.2d 592, 595 (Minn. 1963); *see also Hahn v. Graham*, 225 N.W.2d 385, 386 (Minn. 1975). If contestants fail to allege that the contestee did not receive the highest number of votes legally cast, the court lacks jurisdiction to hear the contest. *Christenson*, 119 N.W.2d at 39.

21. On November 24, 2020, the State Canvassing Board certified Senator Smith as the winner of the United States Senate race. Contestants have alleged several irregularities in the election process, but they have failed to allege that Senator Smith did not receive the highest number of votes legally cast because of these claimed irregularities.

22. For example, they alleged that a state legislator claimed to have votes banked for his reelection and that a polling “that he had not paid for” showed that he would win. But contestants failed to explain how this alleged irregularity impacted the outcome of the United States Senate election. Contestants also alleged a financial ballot-harvesting scheme. But, again, they failed to allege that such scheme impacted the outcome of this election.

23. Contestants also alleged that the postelection review (PER) process, which serves to ensure that the complete vote totals are correct, was conducted in a manner that violated Minnesota law. Contestants specifically alleged several concerns regarding the PER process conducted in Dakota County. They claimed that Dakota County failed to use election judges, separate absentee ballots from polling-place ballots, match hand-written results with reported results, use unbiased counters, allow the public a meaningful opportunity to observe the counting because they were asked to stand six feet from the table, have ballots delivered in a uniform way, preserve election material, and email a worksheet to an observer as promised. But contestants have failed to allege in the notice of contest that any of these alleged irregularities would have altered the outcome of Senator Smith’s 168,377-vote victory in Minnesota’s United States Senate race.

24. Contestants claim that they do not know the winner of the general election because of these claimed irregularities. But this conclusory allegation is insufficient to undermine the prima facie evidence that Senator Smith was elected to the office as certified by the State Canvassing Board. Contestants have alleged various other irregularities in the election process, but failed to allege in the notice that any of these irregularities impacted

the outcome of the election such that Senator Smith did not receive the largest number of votes legally cast. The court is powerless to hear election contests when the contestants fail to seek a change in the outcome of the election. *See, e.g., Hancock*, 122 N.W.2d at 595. Contestants have failed to invoke the court's jurisdiction over the election contest against Senator Smith.

25. Contestants argue in their memorandum that this court should allow the election contest to proceed as a general "civil action" in which the Panel can "address general election and ballot issues" as a way to "protect important public interest[s] in ensuring fairness in state elections" and enable an "investigation into the entire election system: the laws, the rules, the equipment, the data, the election materials and the people." The legislature has not conferred jurisdiction upon this court to hear an action of this nature.

26. Contestants' notice is insufficient to confer this court with jurisdiction over the contest against Senator Smith. The court additionally has no power to allow contestants to amend their notice because "the court cannot appropriate to itself jurisdiction which the law does not give by permitting such amendments after the time for initiating the proceeding has expired." *See Christenson*, 119 N.W.2d at 41. As a result, we grant Senator Smith's motion to dismiss with prejudice.

IT IS HEREBY ORDERED:

1. Secretary of State Steve Simon's motion to dismiss with prejudice is GRANTED.

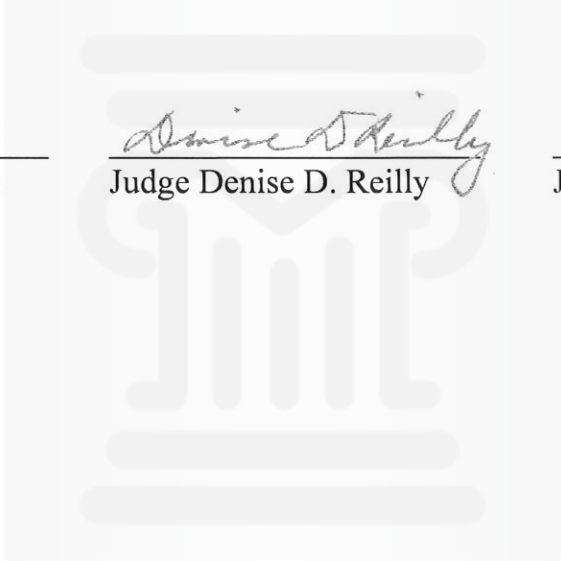
2. Senator Tina Smith's motion to dismiss with prejudice is GRANTED.

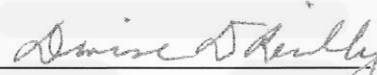
LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 29, 2020



Judge Jennifer L. Frisch





Judge Denise D. Reilly



Judge Renee Worke

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