

Edwin Hahn, Janine Hanson, Laurie Christianson,
Lisa Hahn, Marilyn Proulx, Ronald White,
John Kowalski, and Janine Kowalski,

Court File No. 14-CV-20-4033

Contestants,

vs.

**ORDER AND
MEMORANDUM**

Steve Simon, only in his official capacity as
Minnesota Secretary of State, Lori Johnson, only
in her official capacity as the Auditor-Treasurer for
Clay County, and Heather Keeler,

Contestees.

The above-entitled matter came on for hearing on December 10, 2020, before the Honorable Timothy M. Churchwell, Judge of District Court, at the Douglas County Courthouse in Alexandria, Minnesota, for consideration of the following motions:

1. Contestee Steve Simon's Motion to Dismiss for lack of subject-matter jurisdiction dated December 3, 2020;
2. Contestee Heather Keeler's Motion to Dismiss for lack of jurisdiction and failure to state a claim upon which relief may be granted dated December 7, 2020; and
3. Contestee Lori Johnson's Motion to Dismiss for lack of subject-matter jurisdiction dated December 8, 2020.

This is an election contest under Minnesota Statutes, Chapter 209. The hearing was conducted by remote application (Zoom).¹

¹ During the hearing, technical issues were experienced with Zoom. Contestant Janine Hanson was not able to communicate during the hearing, but was able to listen to the proceedings. Contestant Laurie Christianson's connection was dropped during the hearing, but she was able to continue to listen to the proceedings. Both Contestants were advised to email with any questions or comments. Although emails were received during the hearing, neither Contestant made any further comment. Contestants John and

Contestant, Edwin Hahn, appeared without counsel.

Contestant, Janine Hanson, appeared without counsel.

Contestant, Laurie Christianson, appeared without counsel.

Contestant, Lisa Hahn, appeared without counsel.

Contestant, Marilyn Proulx, appeared without counsel.

Contestant, Ronald White, appeared without counsel.

Contestant, John Kowalski, appeared without counsel.

Contestant, Janine Kowalski, appeared without counsel.

Contestee, Steve Simon, appeared by his attorney, Nathan J. Hartshorn, Assistant Attorney General, Office of the Minnesota Attorney General.

Contestee, Lori Johnson, appeared by her attorney, Brian J. Melton, Clay County Attorney.

Contestee, Heather Keeler, appeared personally together with her attorney, Charles N. Nauen, of Lockridge, Grindal, & Nauen, PLLP.

Prior to the hearing, the parties submitted affidavits, exhibits and memorandums. At the hearing, Contestees presented their motions through counsel and argument was made by all parties. Thereafter, the Court took the matters under advisement.

Based upon the Notice of Election Contest, motions, memorandums, affidavits, exhibits, arguments of the parties, and relevant law, together with all of the file and record herein, the Court hereby makes the following:

Janine Kowalski were able to connect by audio, but not video. Due to the time sensitive nature of the proceedings, the Court continued with the motion hearing.

ORDER

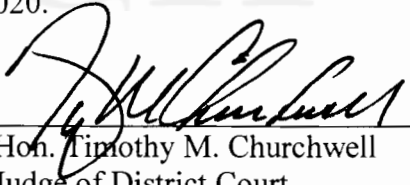
1. Contestee Steve Simon's Motion to Dismiss dated December 3, 2020, for lack of subject-matter jurisdiction, is GRANTED.
2. Contestee Lori Johnson's Motion to Dismiss dated December 8, 2020, for lack of subject-matter jurisdiction, is GRANTED.
3. Contestee Heather Keeler's Motion to Dismiss dated December 7, 2020, for lack of jurisdiction, is GRANTED.
4. Contestee Heather Keeler's Motion to Dismiss dated December 7, 2020, for failure to state a claim upon which relief may be granted, is GRANTED.
5. Accordingly, Contestants' Notice of Election Contest dated November 30, 2020, is DISMISSED WITH PREJUDICE.
6. Pursuant to Minn. Stat. § 209.07, subd. 3, costs are herein awarded to Contestees, Steve Simon, Lori Johnson, and Heather Keeler. Affidavits for recovery of permitted costs shall be filed in accordance with the Rules.
7. Pursuant to Minn. Stat. § 209.10, subd. 3, unless the matter is timely appealed to the Minnesota Supreme Court, court administration shall transmit a copy of all orders and records of the proceeding to the Chief Clerk of the Minnesota House of Representatives, said transmission to occur on or before January 4, 2021.
8. The attached Memorandum is incorporated by reference.

It is so **ORDERED** this 14th day of December, 2020.

JUDGMENT

I hereby certify that the foregoing order constitutes the Judgment of the Court.

Date: December 14, 2020 By: *Tamara C. Fletcher*, Deputy



Hon. Timothy M. Churchwell
Judge of District Court

Filed in District Court
State of Minnesota
December 14, 2020

MEMORANDUM OF LAW

Introduction

Contestants filed a Notice of Election Contest dated November 30, 2020, under Minnesota Statutes, Chapter 209, concerning the State House seat for Legislative District 4A. Generally, Contestants challenge the validity of a Consent Decree concerning various election and balloting matters entered into between Contestee Steve Simon [Simon] and other parties, and failure to comply with statutory Post-Election Review (PER) process requirements.

Facts

Election

Contestant, Edwin Hahn [Hahn], and Contestee, Heather Keeler [Keeler], were candidates for the State House seat in Legislative District 4A, which District is located solely within Clay County, Minnesota. The general election was held on November 3, 2020. Reportedly, there were 21,204 votes cast in Legislative District 4A, of which over 12,000 were absentee ballots. *Notice of Election Contest*, p. 3 (November 30, 2020).

Following the election, the Clay County Auditor-Treasurer, Contestee Lori Johnson [Johnson], convened the Clay County Canvassing Board and declared Keeler the winner on November 13, 2020. Clay County's post-election review (PER) was completed on November 17, 2020, without issue. Accordingly, Keeler was certified as the winner. *Affidavit of Lori Johnson* (December 4, 2020). Keeler won the election by a reported margin of 2,739 votes, or 13.5 percent. *See, Keeler Memorandum*, n. 3 (December 7, 2020).

Post-Election Review

The PER was conducted under the supervision of Johnson. Johnson did not use any election judges, but relied upon her staff for the canvassing process. *Affidavit of Laurie Christianson*, para.

6 (November 30, 2020). During the process, Johnson allowed nine (9) observers to watch the canvassing process. *Affidavit of Ronald White, para. 4 (November 30, 2020)*. Initially, Johnson required the observers to stand some distance away from the canvassing process, but reduced it to six (6) feet at the request of some observers. *Affidavit of Janine Hanson, para. 11 (November 30, 2020)*; *Affidavit of Marilyn Proulx, para. 4 (November 30, 2020)*. Due to the distance, observers reportedly could not see information on ballots, such as how they were marked. *Affidavit of Ronald White, para. 5*; *Affidavit of Janine Hanson, para. 11*; *Affidavit of Marilyn Proulx, para. 5, 7*; *Affidavit of Laurie Christianson, para. 10 (could not see initials on absentee ballots)*. Observers also noted there were no absentee ballot envelopes present during the review. *Affidavit of Ronald White, para. 6*; *Affidavit of Janine Hanson, para. 12*; *Affidavit of Laurie Christianson, para. 11*; *Affidavit of Marilyn Proulx, para. 8*. Observers felt the review was conducted too quickly and lacked any substantive inspection or actual attempt to validate a ballot. *Affidavit of Ronald White, para. 6, 7*.

Notice of Contest and Service upon Keeler

Contestants filed a Notice of Contest [Notice] on November 30, 2020. The document was electronically signed by Contestants. Although the Contestants' addresses were included, they did not include their telephone numbers and e-mail addresses. Personal service on Keeler was attempted on November 30, and December 1, 2020. *Certificate of Service (December 1, 2020)*. Hahn filed an affidavit stating he served the Notice of Contest upon all Contestees by United States Mail. *Affidavit of Edwin Hahn (November 30, 2020) (attached to Petition)*. The affidavit does not identify which addresses were used for purposes of effectuating service. Keeler acknowledges receiving a copy of the Notice of Contest by e-mail on November 30, 2020, and United States Mail on December 4, 2020. *Affidavit of Heather Keeler (December 7, 2020)*.

Consent Decree

One issue raised in the Notice concerns the validity of a Consent Decree arising out of an action in Ramsey County. *Robert LaRose, et al. v. Steve Simon, Court File No. 62-CV-20-3149 (Ramsey County); Declaration of Charles N. Nauen, Exhibits 1, 2 (December 7, 2020)*. In May, 2020, the above-entitled action was filed against Simon regarding various election issues, including suspension of the witness requirement for absentee ballots. On July 17, 2020, the parties entered into a Consent Decree which was later approved by the District Court on August 3, 2020 [*LaRose Consent Decree*]. As part of the terms, petitioners agreed to release any claims arising under the Minnesota or United States Constitution regarding the suspension of a witness requirement for absentee ballots in the November General Election. *Exhibit 1, para. IV-A*. The *LaRose Consent Decree* did not apply to claims pertaining to any subsequent election. *Exhibit 1, para. IV-B*. The *LaRose Consent Decree* also addressed how matters would be addressed for the November General Election. *Exhibit 1, sec. VI*.

As part of the August 3, 2020, Order approving the *LaRose Consent Decree*, the District Court granted permissive intervention to other parties, including various elements or aspects of the Republican Party. *Declaration of Charles N. Nauen, Exhibit 2*. They appealed the *LaRose Consent Decree* to the Minnesota Supreme Court. On August 18, 2020, the appeal was voluntarily dismissed. *Declaration of Charles N. Nauen, Exhibits 3, 4*.

On November 24, 2020, an action was filed with the Minnesota Supreme Court challenging, in part, the *LaRose Consent Decree*. *Kistner, et al. v. Steve Simon, et al., File No. A20-1486; Declaration of Charles N. Nauen, Exhibit 5*. Similar to the present action, petitioners challenged the PER process and complained of being unable to see ballots due to a six-foot distance requirement; lack of party balance requirements; failure to train officials and staff properly;

worksheet irregularities, and poor PER evaluation. *See e.g., Petition to Correct Errors and Omissions, para. 62 (November 23, 2020); Declaration of Charles N. Nauen, Exhibit 5.* On December 4, 2020, the Minnesota Supreme Court dismissed the Petition on grounds it was barred by the doctrine of laches. *Declaration of Charles N. Nauen, Exhibit 6.*

Analysis

General Standards – Election Contests

The authority of courts to entertain election contests is purely statutory, and, absent statutory authorization, the courts are without jurisdiction to entertain such proceedings. *Phillips v. Ericson*, 80 N.W.2d 513, 515 (Minn. 1957). The courts have no jurisdiction to hear or determine election contests involving the election of members of our legislature except such as is expressly conferred upon it by the legislature. *Id.* Strong public policy favoring election finality mandates courts to strictly construe statutes applicable to election contests. *Stransky v. Indep. Sch. Dist. 761*, 439 N.W.2d 408, 410-411 (Minn. App. 1989); *Greenly v. Indep. Sch. Dist. No. 316*, 395 N.W.2d 86, 91 (Minn. App. 1986).

Subject-Matter Jurisdiction

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). Whether subject-matter jurisdiction exists is a question of law. *Hale v. Viking Trucking Co.*, 654 N.W.2d 119, 123 (Minn. 2002); *Centra Homes, LLC v. City of Norwood Young America*, 834 N.W.2d 581, 585 (Minn. App. 2013). Defects in subject-matter jurisdiction may be raised at any time and cannot be waived by the parties. *Seehus*, 783 N.W.2d at 147.

Chapter 209 specifically identifies the proper contestee according to the type of election contest at issue. *See generally* Minn. Stat. § 209.021, subd. 3 (contest relating to the nomination

or election of a candidate, the candidate is the contestee; contest related to a constitutional amendment, the secretary of state is the contestee; and, contest related to a question voted on within only one county, school district, or municipality, then the county auditor, clerk of the school district, or municipal clerk, respectively, is the contestee). In contests for State Legislative Offices, the contestee is the successful candidate. Minn. Stat. §§ 209.021, subd. 3, 209.10.

Presently, Contestants have named the Minnesota Secretary of State, Simon, and Clay County Auditor-Treasurer, Johnson, as Contestees. Absent other statutory grounds, none of which are alleged by Contestants, neither individual may properly be made a Contestee to the proceeding. Although Simon and Johnson are integrally part of the election process, as correctly contended by Contestants, the statute does not permit them to be made a party in this instance. Based upon the plain language of the statute, the legislature has not authorized them to be made parties even if issues pertaining to their respective responsibilities are raised. By statute, the only proper Contestee is Keeler, the successful candidate.

Accordingly, the motions to dismiss for lack of subject-matter jurisdiction by Simon and Johnson are granted.

*Lack of Jurisdiction
Timeliness*

Because the right to contest an election is purely statutory, the provisions of the statute relating to the filing and serving of notice of contest must be strictly followed if the court is to acquire jurisdiction. *Lebens v. Harbeck*, 243 N.W.2d 128, 129 (Minn. 1976); *Petrafeso v. McFarlin*, 207 N.W.2d 343, 345 (Minn. 1973). It is essential that a contestant perform within a specified time and manner the acts that are necessary to invoke the court's jurisdiction. *Petrafeso*, 207 N.W.2d at 346. This is especially true of contests involving legislative offices because the legislature convenes only a short time after the canvass of an election. *Id.* Failure to strictly follow

filing and service requirements deprives the district court of jurisdiction and results in dismissal. *Franson v. Carlson*, 137 N.W.2d 835, 837 (Minn. 1965). Stated simply, if the appeal is not taken in the manner and within the time required by statute, the court acquires no jurisdiction. *Odegard v. Lemire*, 119 N.W. 1057, 1058 (Minn. 1909).

In a general election, the contestant must serve and file a notice of contest within seven days after the canvass is completed. Minn. Stat. § 209.021, subd. 1. In elections involving a multi-county legislative district position, the Minnesota Supreme Court has noted the time begins once the State Canvassing Board completes the canvass. *Pearson v. Chmielewski*, 183 N.W.2d 566, 567 (Minn. 1971). Correspondingly, if the election contest challenges the election of a state legislative position for a single-county legislative district, the Minnesota Supreme Court has noted the time begins once the County Canvassing Board completes the canvass. *O'Loughlin v. Otis*, 276 N.W.2d 38, 39 (Minn. 1979).

In this case, the Clay County Canvassing Board declared Keeler the winner on November 13, 2020, and completed the PER on November 17, 2020. Accordingly, Keeler was certified the winner by the Clay County Canvassing Board as of November 17, 2020. The State Canvassing Board completed its duties on November 24, 2020. Contestants served and filed their Notice of Contest on November 30, 2020. By statute, and application of case law, Keeler contends the seven (7) day deadline commenced upon completion by the Clay County Canvassing Board on November 17th, and therefore, the Notice of Contest was required to be filed on or before November 24, 2020.

Although neither Chapter 209, nor any appellate decision, specifically state which canvassing board controls this issue, the Court finds compelling the implicit logic incorporated by the Minnesota Supreme Court in the above-cited decisions for two reasons. First, the only

Canvassing Board to play a role in this legislative office election was Clay County's. The State Canvassing Board had no bearing on the outcome of the election. Further, the overall statutory framework recognizes the distinction between multi-county districts and statewide offices versus single-county districts. *See e.g.* Minn. Stat. § 204C.33, subd. 1 (county canvassing board shall declare the candidate duly elected who received the highest number of votes for each county and the state office voted for only within the county). Second, the Notice of Contest does not identify any issues with the State Canvassing Board. The Contestants confirmed their position at the hearing on December 11th. Since the issues relate solely to the PER completed by the Clay County Canvassing Board, and considering the strict compliance requirement well established by case law, there is no basis upon which to adopt the State Canvassing Board date in order to extend the deadline for filing a challenge.

Accordingly, the filing deadline properly commenced with the completion of the Clay County Canvassing Board on November 17, 2020. Because Contestants did not timely file their Notice of Contest, Keeler's motion to dismiss on this ground is granted.

*Lack of Jurisdiction
Service Upon Keeler*

Service of Notice of a Contest must be made in the same manner as the service of a summons in civil actions. Minn. Stat. § 209.021, subd. 1; *Schmitt v. McLaughlin*, 275 N.W.2d 587, 590 (Minn. 1979) ("Because an election contest is a special proceeding tried as a civil action, the rules governing civil actions prevail."). Under the Minnesota Rules of Civil Procedure, service shall be made upon an individual "by delivering a copy to the individual personally" or "by leaving a copy at the individual's usual place of abode with some person of suitable age and discretion then residing therein." Minn. R. Civ. Proc., Rule 4.03(a); *accord* Minn. Stat. § 209.021, subd. 3 (requiring service upon contestee by personal or substituted service).

If neither personal nor substitute service is possible, the Notice of Contest may be served by certified mail. Minn. Stat. § 209.021, subd. 3. In order to do so, the contestant must provide two affidavits: (1) an affidavit by the person attempting to make service, and (2) the affidavit of the person who sent a copy of the Notice of Contest to the contestee by certified mail. *Id.* Both documents are required to confer jurisdiction upon the court to decide the contest. *Id.* However, service may not be accomplished by a party to the action. Minn. R. Civ. Proc., Rule 4.02. Because service of an election contest must be made in the same manner as the service of summons in civil cases, a party to an election contest may not effect service. *Stransky v. Indep. Sch. Dist. 761*, 439 N.W.2d 408, 410-411 (Minn. App. 1989). Failure to follow this rule deprives the district court of jurisdiction. *Id.* Even substantial compliance with statutory requirements is inadequate to confer jurisdiction. *Id.*; *O'Loughlin*, 276 N.W.2d at 41.

Here, the two required affidavits were filed by Contestants. The certificate of unserved process by the Clay County Sheriff's Office was filed on December 1, 2020. The affidavit of service by mail was signed and filed by Hahn, which is attached to the Notice filed on November 30, 2020. Although an issue has been raised by Keeler about the time of the filings, a material defect lies with the affidavit of the person who sent it by United States Mail, Hahn, a party to the proceeding.² By statute, rule, and case law, Hahn is ineligible to effect service by mail. Further, the Minnesota Supreme Court has stated the defect is not curable. *Chmielewski*, 137 N.W.2d at 569 (failure to file necessary affidavits of service by mail cannot be cured on remand due to lapse of time requirements).

² Hahn's Affidavit is dated November 30, 2020, one day prior to the Affidavit of Attempted Service (December 1, 2020) by the Clay County Sheriff's Office. The record is unclear as to why Hahn, and the other Contestants, sought to effectuate service by mail even prior to unsuccessful personal service upon Keeler.

For this reason, the Court lacks jurisdiction on grounds Contestants failed to properly serve the Notice of Contest upon Contestee Keeler within the time prescribed by law.³

*Lack of Jurisdiction
Failure to Plead*

A 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 of law, or on the grounds of deliberate, serious, and material violations of the Minnesota Election Law. Minn. Stat. § 209.02, subd. 1. A notice of election contest is sufficient if it states facts sufficient to apprise the contestee of the grounds of the contest so that he is given a fair opportunity to meet the asserted claims. *Greenly*, 395 N.W.2d at 91. A notice which charges irregularities in the election but fails to allege how these irregularities deprived the voters of a fair election does not constitute valid notice. *Id.*; *Hancock v. Lewis*, 122 N.W.2d 592, 595 (Minn. 1963). Further, unless there is a “plain statement showing that the contestant is entitled to a decree changing the declared result of the election”, the notice of contest “is a nullity and insufficient to invoke the jurisdiction of the court.” *Christenson v. Allen*, 119 N.W.2d 35, 40–41 (Minn. 1963).

In the Notice of Contest, Contestants raise two primary issues. First, Contestants challenge the validity, and inclusion, of absentee ballots in the vote totals:

The validity of the results of the November 3, 2020 election in Legislative District 04A, Clay County are at stake as the result of the Secretary’s actions in handling the absentee ballots contrary to Minnesota Election Law. The Secretary changed the process for handling absentee ballots. As a result, the inclusion and tabulation of absentee ballots is improper and must be corrected or not be permitted.

³ The Court also notes that other than Contestant Hahn, none of the Contestants provided their e-mail address and telephone number within the Petition as required by Minn. R. Civ. Proc., Rule 11.01. *See* Minn. Stat. § 209.021, subd. 1; *Schmitt*, 275 N.W.2d at 590.

Notice, p. 4. The Notice goes on to generally reference two settlement agreements, one dated June 17, 2020, and the other August 3, 2020 (the *LaRose* Consent Decree), regarding waiver of the witness requirement for absentee ballots. On its face, this portion of the challenge arguably seeks to exclude all absentee ballots from the total vote calculations. Separate, and in addition to, the stark reality a blanket exclusion of absentee ballots would disenfranchise more than 12,000 voters in Clay County, there is no allegation such action would change the outcome of the election.

Second, Contestants contend the PER was conducted improperly and insufficiently. *Notice, p. 11 – 12.* Specifically, the Notice alleges:

The Secretary has a duty to guard against deprivation of the right to vote and to ensure that all candidates, political parties, and voters, have meaningful access to observe and monitor the electoral process, including the November 3, 2020 general election and Clay County’s PER in order to ensure that the electoral process is properly administered in every precinct and is otherwise free, fair and transparent.

Rather than heeding these mandates and duties, the Secretary and Ms. Johnson arbitrarily and capriciously denied the public, including a candidate, to meaningfully observe and monitor the election process in the PER.

Notice, p. 19. There is no allegation a review of the PER process undertaken by Johnson and her staff would result in a change in the outcome of the election.

Similarly, in reviewing the section entitled “Relief Requested,” the Court finds there is no request to change the election outcome; but rather, a litany of requests to access specific individual voter records, voting machine information, political affiliations of various individuals, and to inspect the voting machines. *Notice, p. 19 – 20.*

Finally, as acknowledged by Contestants at the hearing on December 10th, they are not seeking to overturn the election; but rather, are asking the Court to order a forensic accounting of every ballot, and absentee ballot application, to discern whether the voter was eligible to vote and the validity of each vote cast, in order to determine the true outcome of the election.

On these bases, the Court concludes the Contestants failed to plead the vote totals were inaccurate and resulted in the wrong candidate being declared the winner, which is an essential legal predicate to sustain an election contest under Chapter 209. Additionally, the Court notes Contestants are unable to amend the Notice. In order for a contestant to be entitled to amend a notice of election contest after the time for filing notice has expired, the original notice must have been valid under the statute. *Greenly*, 395 N.W.2d at 91. If the original notice is invalid, it cannot be validated by amendment after expiration of the statutory period. *Id.*; see also *Christenson*, 119 N.W.2d at 41 (A sufficient statutory notice of election contest must exist before the Court’s power to grant an amendment can be exercised.).

Accordingly, Keeler’s motion to dismiss for lack of jurisdiction on grounds Contestants failed to assert a plain statement showing Contestant Hahn is entitled to a decree changing the declared result of the election is granted.

Rule 12

The Minnesota Rules of Civil Procedure allow for dismissal of a suit for failure to state a claim upon which relief can be granted. Minn. R. Civ. P., Rule 12.02(e). A district court may only dismiss a complaint or counterclaim under Rule 12.02(e) if “it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded.” *Finn v. Alliance Bank*, 860 N.W.2d 638, 653 (Minn. 2015). In considering motions to dismiss under Rule 12.02(e), courts consider only the facts alleged in the challenged pleading, accept them as true, and construe all reasonable inferences in favor of the nonmoving party. *Id.* However, a court is not bound by legal conclusions or assertions in the pleading. *Id.* at 653–54. Courts may also consider documents referenced in the pleading. *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 490 (Minn. 2004). If a complaint fails to state a claim

upon which relief can be granted, dismissal with prejudice and on the merits is appropriate. *Martens v. Minnesota Min. & Mfg. Co.*, 616 N.W.2d 732, 748 (Minn. 2000).

As noted above, Contestants' challenges rest on the validity of two earlier settlement agreements involving the Secretary of State, and secondly, the PER process conducted by Clay County. The Court begins with the settlement agreements.⁴ Briefly, on August 3, 2020, the *LaRose* Consent Decree, involving claims related to suspending the witness requirement for absentee ballots, was approved by Judge Grewing. As part of approving the *LaRose* Consent Decree, Judge Grewing granted permissive intervention to elements of the Republican Party, presumably for purposes of appeal. *Declaration of Charles N. Nauen, Exhibit 2*. Two weeks later, August 18th, all parties agreed to dismiss the appeal, but reserved the right to renew the action as it may relate to future elections. *Declaration of Charles N. Nauen, Exhibit 3*.

On November 24, 2020, a Petition was filed with the Supreme Court seeking to invalidate the *LaRose* Consent Decree. *Kistner, et al. v. Simon, et al.*, A20-1486; *Declaration of Charles N. Nauen, Exhibit 5*. In response to the Petition, the Minnesota Supreme Court issued an Order on December 4, 2020, dismissing all claims related to the *LaRose* Consent Decree based upon the doctrine of laches.⁵ *Declaration of Charles N. Nauen, Exhibit 6*.

Accordingly, the Court begins with the doctrine of laches. Laches is an equitable doctrine applied to "prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay." *Winters v. Kiffmeyer*, 650 N.W.2d 167, 169 (Minn. 2002) (quoting *Aronovitch v. Levy*, 56 N.W.2d 570, 574 (Minn. 1953)). The Minnesota

⁴ The Notice of Contest does not specifically identify the settlement agreements, but based upon acknowledgments by Contestants at the hearing, the reference includes the Consent Decree filed in Ramsey County. *LaRose v. Simon*, Court File No. 62-CV-20-3149 (Ramsey County Dist. Ct.).

⁵ The decision also addressed another Consent Decree. *NAACP-Minn. v. Simon*, Court File No. 62-CV-20-3625 (Ramsey County Dist. Ct.).

Supreme Court has denied election challenges on grounds of laches. *See Trooien v. Simon*, 918 N.W.2d 560, 561 (Minn. 2018) (order dismissing a ballot challenge, noting that “millions of ballots were prepared” and early voting had begun before candidate filed challenge); *Clark v. Reddick*, 791 N.W.2d 292, 294–96 (Minn. 2010) (declining to hear a challenge to a ballot when the petitioner waited more than 2 months to file the petition, which was 15 days before absentee ballots were to be made available to voters); *Clark v. Pawlenty*, 755 N.W.2d 293, 301–03 (Minn. 2008) (declining to hear a challenge to a primary ballot when ballots had already been printed and absentee ballots distributed).⁶

In evaluating a claim of laches, the practical question in each case is whether there has been such an unreasonable delay in asserting a known right, resulting in prejudice to others, as would make it inequitable to grant the relief prayed for. *Fetsch v. Holm*, 52 N.W.2d 113, 115 (Minn. 1952). A delay is unreasonable if public information existed such that knowledge of the duty to assert one’s right may be fairly imputed to the petitioner. *De La Fuente v. Simon*, 940 N.W.2d 477, 484–85 (Minn. 2020). Courts require greater diligence in asserting rights when “the facts are a matter of public record and an inspection of the record is suggested by ordinary prudence.” *Briggs v. Buzell*, 204 N.W. 548, 549 (Minn. 1925). For example, in *Reddick*, the Minnesota Supreme Court looked to information available in an affidavit of candidacy to conclude petitioner’s duty to act was triggered by the public filing. *Reddick*, 791 N.W.2d at 294–95. Similarly, in *Pawlenty*, the Minnesota Supreme Court held a challenge to the designation of a candidate as the “incumbent” could have been made as soon as the candidate filed an affidavit of candidacy. *Pawlenty*, 755 N.W.2d at 300.

⁶ Although the cited cases concern ballot challenges under Minn. Stat. § 204B.44, as opposed to an election contest under Chapter 209, the Court finds them instructive for purposes of a laches analysis. In this election contest, Contestants challenge the *LaRose* Consent Decree because it removed the witness requirement for absentee ballots. Thus, Contestants effectively assert a ballot challenge.

In this instance, the Court finds and concludes Contestants were unreasonable in waiting until November 30, 2020, the date the Notice was filed, to challenge the *LaRose* Consent Decree. The *LaRose* Consent Decree was a matter of public record on August 3, 2020. The suspension of the witness requirement was publicly announced throughout Minnesota well before voting began on September 18, 2020. Finally, as noted earlier, the *LaRose* Consent Decree was the subject of the *Kistner* petition filed with the Minnesota Supreme Court on November 24, 2020. Based upon the undisputed public record regarding the suspension of the witness requirement for absentee ballots, Contestants had a duty to challenge this issue well before November 30, 2020. Consistent with the decision by the Minnesota Supreme Court in *Kistner*, asserting these claims nearly four months after the *LaRose* Consent Decree was authorized, two months after voting started, four weeks after voting ended, and nearly two weeks after the County Canvassing Board certified the election results, is unreasonable.

Contestants argue they could not have challenged the election results until after the election. As evidenced by the proceedings in *Kistner* though, this contention is plainly untrue. While Contestants could not have filed an election contest until after the election, there were other legal recourses available to them, such as a petition to correct errors, prior to the election. Here, Contestants made a decision to challenge the absentee voting requirements after voting was done. Even though Contestants may not have appreciated the consequences of their decision, their misunderstanding is not a basis to find the present Notice timely.

Secondly, and perhaps more substantively, the resulting prejudice to absentee voters in Clay County would be profound. Contestants' request would completely undermine the voters' reliance upon public assurances the witness requirement was suspended for the general election. Mere disagreement with an absentee ballot rule change that existed months before voting began is

insufficient reason to inspect those ballots following the election. Ironically, at the heart of Contestants' challenge to the *LaRose* Consent Decree is a direct attempt to disenfranchise absentee voters. In essence, Contestants are asking the Court to change the voting rules after the election. If granted, the Court's decision would fundamentally erode public confidence in the absentee voting process. The Court understands Contestants believe the absentee voting process was flawed due to the rule change suspending the witness requirement; but, upending the rule change post-election would simply disenfranchise those voters. In short, it would be a grossly inequitable outcome.

For these reasons, the Court concludes Contestants unreasonably delayed challenging the *LaRose* Consent Decree, and as such, there would be significant prejudice to the Clay County electorate.⁷ Accordingly, based upon the equitable doctrine of laches, and consistent with the *LaRose* decision, Contestants' challenge to the absentee voting process is barred.

The second challenge centers on the PER process in Clay County. A post-election review, or PER, is essentially an audit function requiring review of a certain number of precincts and ballots cast within each precinct. Minn. Stat. §§ 206.89, subd. 2, 204C.32, subd. 1. It is not a forensic review of rules governing elections, nor each and every ballot cast in an election absent objective indicators of error. Here, Contestants' claims involve many components and allegations. For purposes of a brief review, the Court considers only the allegations related to PER irregularities in Clay County, Minnesota, and which are factually supported.⁸

For example, Contestants allege Johnson failed to utilize election judges of different major political parties, or bipartisan review, in several post-election capacities, in violation of Minn. Stat.

⁷ Additionally, if the Court granted the myriad of requests outlined in the Notice, together with others filed after the initial Notice, the resulting burden to Clay County election officials to timely comply with the requests would be staggering.

⁸ The affidavits filed by Contestants include references to issues in other districts or jurisdictions. The allegations, at times, are based upon hearsay or unsubstantiated references to news reports. In fact, Contestants did not file any news reports supporting their claims.

§ 203B.121, subd. 2(a). In response, Johnson acknowledges she did not utilize election judges in the PER process, but relied upon her own staff. *See, Affidavit of Lori Johnson.*

The statute though does not require the use of election judges to conduct the PER. Minn. Stat. § 206.89, subd. 3. However, if election judges are used, then the party balance requirements of section 204B.19 applies. *Id.* Furthermore, the Secretary of State is authorized by statute to adopt rules related to absentee ballots. Minn. Stat. § 203B.08, subd. 4. One rule adopted addresses who is authorized to review absentee ballots:

Two or more ballot board members from different major political parties must review the absentee ballots returned for the precinct ... *unless they are deputy county auditors or deputy city clerks who have received training in the processing and counting of absentee ballots ...*

Minn. R. 8210.2450, subpart 1 (emphasis added). Based upon the clear statutory language cited herein, Contestants have mistakenly asserted the PER process was flawed for failing to utilize bipartisan political election judges in the review process.

Contestants also allege various deficiencies in the PER process such as not being able to see details on the ballots due to the six-foot social distancing requirement adhered to by Johnson. The law only requires though that the postelection review be conducted in public at the location where the ballots have been securely stored. Minn. Stat. § 206.89, subd. 3. Contestants claim Johnson failed to review the ballot envelopes or applications. Yet, the law does not require any review of the ballot envelopes or applications. *See* Minn. Stat. §§ 206.89, subd. 2, 204C.21, subd. 1. Another claimed violation is the denial to permit Hahn, the unsuccessful candidate, to observe the process. However, legal support for the argument is lacking and the Court notes there were nine (9) monitors in the room.

Moreover, even if a violation of the Minnesota Election Law were found, it would be necessary to determine whether the violation was a serious, deliberate and material violation.

Schmitt, 275 N.W.2d at 591. For a violation to be “deliberate,” it must be intended to affect voting at the election. *Id.* All of Contestants’ allegations regarding the PER process in Clay County relate to matters after the election. As such, there is no basis to find any alleged deficiencies were intended to affect voting prior to, or on the day of, the election.

At this point, the Court declines to delve further into the analysis and determine whether an alleged violation was serious or material. The allegations and concerns raised by Contestants fail to meet even the threshold legal standards. Accordingly, the Court concludes Contestants’ challenge to the PER process in Clay County fails to state a claim upon which relief may be granted and is properly dismissed.

Conclusion

An election contest is to determine who won an election. It is not to conduct a systemic review of the pre- or post-voting rules and processes. By statute, the Court does not have this authority in an election contest. Further, in accordance with basic constitutional principles, the Court may not invalidate a pre-election rule suspension, relied upon by the voting electorate, and thereby disenfranchise the voters of Clay County.

Based upon the substantive and procedural deficiencies and issues noted herein, the Court lacks jurisdiction over the proceeding.

TMC