

The Honorable John E. Bridges  
Friday, February 4, 2005  
8:30 a.m.

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

Timothy Borders, Thomas Canterbury, Tom  
Huff, Margie Ferris, Paul Elvig, Edward  
Monaghan, and Christopher Vance, Washington  
residents and electors, and the Rossi for  
Governor Campaign, a candidate committee,

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' OPPOSITION TO  
MOTIONS OF PIERCE  
COUNTY, TERWILLIGER AND  
LINCOLN COUNTY TO  
DISMISS

Petitioners through counsel file this memorandum in opposition to the following  
motions:

1           1.     Pierce County and Pierce County Auditor's Motion to Dismiss, dated  
2     January 21, 2005.

3           2.     Bob Terwilliger, Snohomish County Auditor's Motion to Dismiss, dated  
4     January 21, 2005.

5           3.     Joinder of Lincoln County and Shelly Johnston, Lincoln County Auditor in  
6     the Motion to Dismiss of Benton and Jefferson Counties, dated January 21, 2005.

7                           **I.     RESPONSE TO PIERCE COUNTY**  
8                           **AND PIERCE COUNTY AUDITOR'S MOTION TO DISMISS**

9           Pierce County and the Pierce County Auditor originally filed a motion to dismiss in  
10    this action on January 14, 2005. On January 21, Pierce County and its auditor filed a new  
11    motion, relying for authority entirely on their previously filed materials. In effect, they  
12    have re-noted the previous motion. Petitioners filed a written opposition to Pierce  
13    County's original motion, and incorporate it herein by reference as their opposition to  
14    Pierce County's new motion.

15                           **II.    OPPOSITION TO TERWILLIGER AND LINCOLN COUNTY**  
16                           **MOTIONS TO DISMISS**

17                           **A.    Bob Terwilliger, Snohomish County Auditor**

18           Bob Terwilliger, Snohomish County Auditor, argues in essence that the current  
19    pleadings lack admissible evidence that Snohomish County election officers committed or  
20    engaged in error, misconduct or neglect, or that they counted illegal votes, and therefore  
21    that the petition should be dismissed as to him.

22                           **1.    Standard of Review**

23           Bob Terwilliger, Snohomish County's Auditor, moves pursuant to  
24    RCW 29A.68.050 to dismiss the petition for failure to state claims against him, on the  
25    theory that the petition and elector affidavits lack admissible evidence to show that  
26    Snohomish County and its auditor committed or engaged in error, misconduct or neglect,  
27    or that they counted illegal votes. The motion is the rough equivalent of a CR 12(b)(6)

1 motion to dismiss for failure to state a claim on which relief can be granted. A dismissal  
2 under this rule is appropriate only if it appears beyond doubt that the plaintiff can prove no  
3 set of facts that would justify recovery. *Gorman v. Garlock, Inc.*, 121 Wn.App. 530  
4 (2004); *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 329-30 (1998), *cert. denied*, 525  
5 U.S. 1171 (1999); *Hoffer v. State*, 110 Wn.2d 415, 420 (1988). A plaintiff's factual  
6 allegations are presumed to be true, and a court may consider hypothetical facts. *Gorman*  
7 *v. Garlock, supra*; *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755 (1994), *cert.*  
8 *denied*, 515 U.S. 1169 (1995). CR 12(b)(6) motions should be granted only sparingly.  
9 *Gorman v. Garlock, supra*; *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750 (1995).

10 Terwilliger may argue in response that Petitioners face a heightened burden on this  
11 motion in light of the requirement of the election contest statutes that the contest be  
12 commenced with the filing of an affidavit of an elector. Petitioners have previously argued  
13 that the affidavit of an elector is not the equivalent of an affidavit filed in support of a  
14 summary judgment, and cannot be judged against the CR 56 requirements of personal  
15 knowledge. *See* Petitioners' Combined Opposition to Motions of Pierce, Benton,  
16 Jefferson, Lewis, Snohomish, Franklin and Skagit Counties and County Auditors to  
17 Dismiss, filed January 18, 2005, at 9-12. Petitioners will not repeat that argument here but  
18 rely on their previous opposition briefing.

19 **2. The Petition and Elector Affidavits State an Election Contest**  
20 **Claim Against Snohomish County and Its Auditor.**

21 Petitioners specifically allege in the petition that Snohomish County counted votes  
22 in excess of the number lawfully registered voters that participated in the election. *See*  
23 *Petition, Par. VI.A.1.* In his declaration, Mr. Terwilliger sidesteps the question of the truth  
24 of that averment (or of any other averment of error or misconduct), neither admitting nor  
25 denying it. The petition alleges, and at this point Petitioners believe that the evidence will  
26 show, that Snohomish County counted a significant number of votes in excess of the  
27 number of registered voters who participated in the election. Petitioners also believe that

1 Snohomish County counted provisional ballots without first investigating whether the  
2 persons casting the ballots were properly registered to vote and had not previously voted in  
3 the election. Until Snohomish and its Auditor respond to discovery, Petitioners' ability to  
4 come forward with admissible evidence on the issue is limited. In response to a 12(b)(6)  
5 motion, the facts alleged in Petitioners pleadings must be taken as true and admissible  
6 evidence demonstrating the truth of those allegations may be developed in discovery.

7 The affidavits of electors also state generally, based on a review of records  
8 specifically including those of Snohomish County, that the votes of disenfranchised felons  
9 were counted in the election, and that votes cast in the name of deceased voters were  
10 counted. *See* Declaration of Sund, ¶ 3; Declaration of Yetter, ¶¶ 3-9. These affidavits do  
11 not specifically allege that Snohomish County accepted votes from felons and from  
12 persons fraudulently voting in the name of deceased voters, but it is likely that the data  
13 when obtained and parsed will in fact show that some of these illegal votes were cast in  
14 Snohomish County. The acceptance of these votes was error under RCW 29A.68.011.  
15 The votes are in addition illegal under RCW 29A.68.020(5), notwithstanding the exclusion  
16 under subsection (5)(b), for the reasons set forth in Petitioners' Memorandum in  
17 Opposition to Washington State Democratic Central Committee's Motion to Dismiss  
18 Causes of Contest, filed today.

19 Finally, the petition and the accompanying elector affidavits assert (and Terwilliger  
20 admits) that the county refused to accept declarations of voters whose votes Snohomish  
21 County had earlier wrongfully declined to count. Terwilliger asserts that the petition fails  
22 to state a claim with respect to these voters because Snohomish County had already  
23 certified its elections results. That fact did not, however, *compel* Terwilliger to decline to  
24 count the ballots. The Washington State Supreme Court had in fact just ruled that county  
25 auditors *could* recanvass ballots during the recount and correct errors where ballots had  
26 been wrongfully rejected in the initial canvass. The County's refusal to act on the  
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1 information of its error squarely raises the equal protection issue set forth in the petition.  
2 The County's denial of the Constitutional equal protection rights of some of its voters must  
3 necessarily also constitute misconduct under RCW 29A.68.011.

4 **B. Lincoln County.**

5 Lincoln County and its auditor have moved to dismiss by joining the previously  
6 filed motions to dismiss of Benton County and its auditor, and Jefferson County and its  
7 auditor, and by filing the declaration of its auditor, Shelly Johnston, that the Lincoln  
8 County election was entirely free of anomalies. Petitioners agree that they do not currently  
9 possess information tending to show error in the conduct of the election in Lincoln County.  
10 Petitioners merely note that as discovery (both formal and informal) has progressed in  
11 connection with this election, information has come to light. Nothing will be  
12 accomplished by dismissing Lincoln County from the action except perhaps to complicate  
13 to some degree the task of obtaining discovery, by virtue of the necessity to employ notices  
14 of deposition and subpoenas duces tecum.

15 **III. CONCLUSION.**

16 For the foregoing reasons, petitioners request that the motions to dismiss be denied.

17 DATED this 26<sup>th</sup> day of January, 2005.

18 Davis Wright Tremaine LLP  
19 Attorneys for Petitioners

20  
21 By Robert J. Maguire  
22 Harry J.F. Korrell, WSBA #23173  
23 Robert J. Maguire, WSBA #29909  
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