

Judge John E. Bridges  
Department 3  
Noted for hearing  
Friday, February 4, 2005; 9:00 a.m.

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

Timothy Borders, et al.  
  
vs.  
  
King County, et al.  
  
Respondents,  
  
Washington State Democratic Central  
Committee,  
  
Intervenor,  
  
Libertarian Party of Washington State, and  
Ruth Bennett campaign,  
  
Intervenors.

No. 05-2-00027-3  
  
BOB TERWILLIGER, SNOHOMISH  
COUNTY AUDITOR'S REPLY  
CONCERNING MOTION TO  
DISMISS

**I. SUMMARY OF REPOSE OF PETITIONERS**

In response to Respondent Bob Terwilliger's motion to dismiss, Petitioners argue first that this motion should be considered a CR 12(b)(6) motion. They further contend that the Court should simply presume the allegations in the Election Contest Petition to be true and that the affidavits they have submitted in support of the Petition need not contain statements of fact based upon personal

1 knowledge. Finally, Petitioners admit that the affidavits they have submitted “do  
2 not specifically allege that Snohomish County accepted votes from felons and  
3 from persons fraudulently voting in the name of deceased voters.” See,  
4 Petitioners’ Opposition to Motions of Pierce County, Terwilliger and Lincoln  
5 County to Dismiss, page 4.

## 6 **II. ARGUMENT**

### 7 **A. This Motion Is Not The Equivalent Of A CR 12(b)(6) Motion.**

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9 Petitioners argue that Respondent Terwilliger’s motion to dismiss this  
10 election contest as to him should be treated as a motion to dismiss under CR  
11 12(b)(6). However, since this is a unique proceeding with threshold requirements  
12 for production of evidence and no required pleadings, the pending motion to  
13 dismiss is not equivalent to a CR 12(b)(6) motion to dismiss a claim in a pleading.  
14 An election contest brought under chapter 29A.68 RCW is unlike a usual civil  
15 action that may be initiated by an unverified complaint without supporting factual  
16 affidavits. An election contest does not contemplate the filing of pleadings  
17 equivalent or similar to a complaint in a civil action. Rather, the statutes call for  
18 the presentation of an affidavit by an elector that presents facts showing certain  
19 errors or wrongful acts have occurred. In an election contest, there is no basis,  
20 as Petitioners claim, for the court to presume allegations not documented in their  
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1 affidavits<sup>1</sup> to be true, nor may the court “consider hypothetical facts.” Petitioners’  
2 Opposition to Motions, page 3.

3 Petitioners rely upon Dumas v. Gagner, 137 Wn.2d 268, 971 P.2d 17  
4 (1999) to support their argument that they need not present any factual evidence  
5 to support allegations contained in their Election Contest Petition. However, the  
6 Dumas v. Gagner case does not support this argument. At issue in Dumas v.  
7 Gagner was whether, when the petition lacked a citation to a specific section of  
8 the election contest statute, the court could provide the relief the petitioner sought  
9 that was available only under a specific statute. The court found that,  
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11 While Respondent does not cite a specific subsection of  
12 either RCW 29.65.010 or RCW 29.04.030, it is apparent from the  
13 facts stated in his petition that issuance of the certificate of election is  
14 the specific ground of his challenge.

15 Although Respondent’s petition did not cite specific subsections of  
16 the statute, sufficient facts and law were stated concerning the nature  
17 of the claim to bring the petition under the statute.

18 (Emphasis added), Dumas v. Gagner, 137 Wn.2d at 282. Unlike the Petitioners’  
19 submittals in the present case, Mr. Dumas’ petition was factually very specific:

20 In his petition, Respondent claims that Appellant Gagner, as  
21 Benton County Auditor, erroneously assigned Appellant Frost to voter  
22 precinct W2-P636 in Port Commissioner District Number One, when  
23 Appellant’s residence at 4107 West 43<sup>rd</sup> Avenue is on a lot situated  
24 completely within voter precinct W2-P690 and Port Commissioner  
25 District Number Two.

26 <sup>1</sup> Petitioners rely upon allegations in their unverified “Election Contest Petition” and not supported by facts contained in any affidavit they have submitted.

1 Dumas v. Gagner, 137 Wn.2d at 272. It is in this context that the Dumas court  
2 held that Mr. Dumas' submittals were adequate, "to give notice to the court and  
3 the opponent of the general nature of the claim asserted." Dumas v. Gagner, 137  
4 Wn.2d at 282. In contrast, Petitioners' submittals in the instant case are wholly  
5 lacking in such necessary factual specificity regarding the allegations against  
6 Respondent Terwilliger.

7 **B. Petitioners Have Failed to Present a Prima Facie Basis For**  
8 **Proceeding Against Respondent Terwilliger.**  
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10 This is a special proceeding brought under chapter 29A.68 RCW. That  
11 statute imposes certain requirements a petitioner must meet to invoke the court's  
12 jurisdiction. RCW 29A.68.011 states, in pertinent part:

13 Any ... judge of the superior court in the proper county shall,  
14 by order, require any person charged with error, wrongful act, or  
15 neglect to forthwith correct the error, desist from the wrongful act, or  
16 perform the duty and to do as the court orders or to show cause  
17 forthwith why the error should not be corrected, the wrongful act  
desisted from, or the duty or order not performed, whenever it is  
made to appear to such ... judge by affidavit of an elector that:

18 (4) A wrongful act other than as provided for in subsections  
19 (1) and (3) of this section has been performed or is about to be  
performed by any election officer; or

20 (5) Any neglect of duty on the part of an election officer other  
21 than as provided for in subsections (1) and (3) of this section has  
occurred or is about to occur; or

22 (6) An error or omission has occurred or is about to occur in  
the issuance of a certificate of election.

23 As pertains to Respondent Terwilliger, an "election officer," Petitioners may  
24 proceed under this statute only if they can show that he "performed a wrongful  
25 act" (RCW 29A.68.011(4)) or a "neglect of his duty occurred" (RCW  
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1 29A.68.011(5)). To the extent Petitioners wish to proceed under RCW  
2 29A.68.011(6), their affidavits must set forth the basis of such claim with  
3 “sufficient certainty.” RCW 29A.68.030.

4 An election contest petition under chapter 29A.68 RCW is much like a  
5 petition for a writ of mandamus under chapter 7.16 RCW. As in the case of an  
6 election contest, a mandamus proceeding is initiated by the filing of a sufficient  
7 affidavit<sup>2</sup>. RCW 7.16.170. A petitioner is not entitled to a writ of mandamus  
8 unless his or her affidavit alleges, “sufficient facts to establish that the [petitioner]  
9 had no plain, speedy, or adequate remedy in the ordinary course of law.” Eugster  
10 v. Spokane, 118 Wn. App. 383, 414, 76 P.3d 741 (2003) (quoting Edwards v.  
11 Tremper, 49 Wn.2d 677, 678, 305 P.2d 1062 (1957)). The court in Eugster v.  
12 Spokane, 118 Wn. App. at 414, explained that “the relevant inquiry is whether the  
13 [petitioner’s] affidavit ... alleged sufficient facts for the trial court to determine  
14 whether” he had a cause of action for mandamus. Similarly, in order for the  
15 Petitioners to proceed in this election contest against Respondent Terwilliger  
16 pursuant to RCW 29A.68.011(4) or (5), they must present the court with one or  
17 more affidavits that set forth “sufficient facts” to show that Respondent Terwilliger  
18 either “performed a wrongful act” or a “neglect of his duty occurred.” In other  
19 words, the affidavits must present facts that establish a prima facie case of  
20 election error.  
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25 <sup>2</sup> A verified complaint may be substituted for a separate affidavit (see, State ex rel. Adams. V. Irwin,  
26 74 Wash. 589, 591-92, 134 P. 484 (1913)) but in the instant case, the “Election Contest Petition”

1 The affidavits submitted by Petitioners fail to meet this threshold showing.  
2 Petitioners admit<sup>3</sup> that their affidavits do not show that Respondent Terwilliger  
3 accepted illegal votes from felons or from persons fraudulently voting in the name  
4 of deceased persons. Moreover, the Declaration of Bob Terwilliger dated  
5 January 31, 2005, Paragraph 12, filed herewith, indicates that Respondent  
6 Terwilliger followed the requirements of RCW 29A.08.510 and RCW 29A.08.520  
7 to purge voter registration records of known felons or deceased persons.  
8 Petitioners also essentially admit they have presented no affidavits showing  
9 Respondent Terwilliger committed the other errors they claim<sup>4</sup>. Rather than rely  
10 on evidentiary facts submitted by sworn affidavits, Petitioners now claim that the  
11 court should simply presume everything they allege in their unverified Election  
12 Contest Petition is true and they should be permitted to proceed to trial.  
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14 An election contest under chapter 29A.68 RCW is not permitted to go to  
15 hearing unless and until a sufficient affidavit has been submitted. RCW  
16 29A.68.040. Because the affidavits submitted by Petitioners are not factually  
17 sufficient and because the time allowed by statute for filing such affidavits has  
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22 submitted on behalf of Petitioners was not verified by them and, therefore it cannot substitute for the  
required affidavit.

23 <sup>3</sup> At page 4 of Petitioners' Opposition to Motions of Pierce County, Terwilliger and Lincoln County to  
Dismiss, Petitioners refer to the affidavits of Sund and Yetter stating, "[t]hese affidavits do not  
24 specifically allege that Snohomish County accepted votes from felons and from persons fraudulently  
voting in the name of deceased voters...."

25 <sup>4</sup> These allegations are that Respondent Terwilliger counted a significant number of votes in excess  
of the number of registered voters who participated in the election and that he counted provisional  
ballots without first validating them. See, Petitioners' Opposition to Motions of Pierce County,  
26 Terwilliger and Lincoln County to Dismiss, pages 3-4.

1 now passed, Petitioners should not be permitted to proceed further with their  
2 claims against Respondent Terwilliger.

3 **C. The Actual Facts Belie Petitioners Unsubstantiated Claims**

4 Petitioners allege that Snohomish County election officials “counted a  
5 significant number of votes in excess of the number of lawfully registered voters  
6 who participated in the election.” Petitioners’ Opposition to Motions, page 3. This  
7 is a false statement (See, Decl. of Bob Terwilliger dated January 31, 2005,  
8 Paragraph 3.) and Petitioners have presented not the slightest shred of evidence  
9 to support it. Instead, they ask the court to just presume their unsubstantiated  
10 accusations to be true. Petitioners have the burden of proof in this case and they  
11 have a burden of initial production under RCW 29A.68.011 that cannot be  
12 satisfied by presumptions.  
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14 Respondent Terwilliger and his staff kept detailed and comprehensive  
15 records of both eligible registered voters and the number of ballots cast by such  
16 voters. Unquestionably, significantly fewer ballots were received in Snohomish  
17 County than the number of registered voters. Fewer polling place votes were  
18 cast than the number of voters eligible to vote at the polls and fewer absentee  
19 ballots were returned than were sent to absentee voters. Declaration of Bob  
20 Terwilliger dated January 31, 2005, Paragraphs 4, 5 and 7.  
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22 By asserting that more votes were received than the number of registered  
23 voters who participated in the election, Petitioners attempt to suggest that either  
24 voters were permitted to vote more than once or that unregistered voters were  
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1 permitted to vote. They offer no evidence to support this accusation whatsoever.  
2 Instead, Petitioners focus on a statistic: the number of voters for whom credit for  
3 voting was given. If Petitioners' concern is prevention of double voting or voting  
4 by unregistered voters, their focus on the statistic for voter credit is misplaced.

5 RCW 29A.44.231 and RCW 29A.60.180 require that records be kept of  
6 those who voted at polling places or by absentee ballot respectively. These  
7 records are created after an election has already been certified. WAC 434-324-  
8 035. There is no requirement for a reconciliation of these records with the  
9 number of votes cast. Voter credit statistics provide no information indicating  
10 whether there were double voters or whether unregistered voters voted. As  
11 detailed in Respondent Terwilliger's Declaration of January 31, 2005, Paragraphs  
12 8-10, the November 2004 general election was conducted in Snohomish County  
13 with controls in place to prevent double voting or voting by unregistered persons  
14 from occurring, contrary to Petitioners' speculation<sup>5</sup>.

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17 Petitioners also accuse Respondent Terwilliger of "counting provisional  
18 ballots without first investigating whether the persons casting the ballots were  
19 properly registered to vote and had not previously voted in the election."  
20 Petitioners' Opposition to Motions, page 4. Yet again, this is a bare allegation  
21 with a complete lack of any evidentiary support. Respondent Terwilliger, in his  
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<sup>5</sup> Double voting and voting by unregistered voters at a polling place is prevented through the use of voter activation cards for electronic voting machines that are issued to voters only after verification that the voter is listed in the poll book as a registered voter and that the voter has not previously voted. Decl. of Terwilliger, Paragraph 8. Absentee ballots are only issued to registered voters and such ballots are counted only after signature verification and verification that the voter has not been flagged as previously returning a ballot. Decl. of Terwilliger, Paragraph 10.

1 Declaration of January 31, 2005, Paragraphs 9 and 11, details the process for  
2 receipt and verification of provisional ballots employed in the November 2004  
3 general election<sup>6</sup>. Clearly, no provisional ballots were counted without prior  
4 verification in Snohomish County.

### 5 III. CONCLUSION

6 In their election contest against Respondent Terwilliger under chapter  
7 29A.68 RCW, the Petitioners must submit factually sufficient affidavits to prove a  
8 prima facie case of “wrongful act” or a “neglect of duty” by Respondent  
9 Terwilliger. Petitioners have clearly failed to meet this initial burden of production  
10 and proof. Therefore, the Election Contest Petition filed herein is legally and  
11 factually insufficient as regards Respondent Terwilliger and it must be dismissed  
12 as to him.  
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14 RESPECTFULLY SUBMITTED this 31st day of January, 2005.

15  
16 JANICE E. ELLIS  
17 Snohomish County Prosecuting Attorney

18 By: /s Gordon W. Sivley \_\_\_\_\_ By: /s Michael c. Held \_\_\_\_\_  
19 Gordon W. Sivley, WSBA 8837 Michael C. Held, WSBA 19696  
20 Deputy Prosecuting Attorney Deputy Prosecuting Attorney  
21 Attorneys for Respondent  
22 Bob Terwilliger, Snohomish County Auditor

23 <sup>6</sup> Persons wishing to vote at a polling place whose names are not listed in the poll books were  
24 issued provisional ballots. These were paper, optical scan ballots that were completely  
25 incompatible with the electronic voting machines located at the polling places and it was impossible  
26 for votes recorded on provisional ballots to have been read by the electronic voting machines.  
Provisional ballots were only counted after voter eligibility was reviewed. The eligibility  
determination included a check against prior voting by the same voter. Decl. of Terwilliger,  
Paragraphs 9 and 11.