



CIRCUIT COURT OF SOUTH DAKOTA SIXTH JUDICIAL CIRCUIT

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RE: 32CIV20-186: In the Matter of Election Contest as to Amendment A, An Amendment to the South Dakota Constitution to Legalize, Regulate, and Tax Marijuana; and to Require the Legislature to Pass Laws Regarding Hemp as well as Laws Ensuring Access to Marijuana for Medical Use

FACTUAL BACKGROUND

The facts surrounding this matter are uncontested.

Amendment A was a proposed constitutional amendment voted on in the General Election on November 3, 2020. The title described Amendment A as: "An amendment to the South Dakota Constitution to legalize, regulate, and tax marijuana; and to require the Legislature to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use." The amendment contains fifteen different primary sections and numerous subsections. These sections relate to the legalization of marijuana, taxation of marijuana, regulation marijuana, implementation of civil penalties for marijuana, and the allocation of power to the Department of

Revenue to “administer and enforce” the licensing and regulation of marijuana. The Department of Revenue is also given the power to implement and enforce rules consistent with the requirements of § 7. In addition, § 14 compels the Legislature to pass laws regarding hemp and ensure access to medical marijuana.

A petition initiating Amendment A was timely submitted to the South Dakota Secretary of State for validation on November 4, 2019. The South Dakota Secretary of State announced on January 6, 2020 that Amendment A had received a sufficient number of signatures and would be placed on the ballot for the 2020 General Election. Amendment A passed with 225,260 votes while 190,477 voters opposed it. The 2020 General Election returns were officially canvassed on November 10, 2020.

Kevin Thom, Pennington County Sheriff, and Colonel Rick Miller, South Dakota Highway Patrol Superintendent (Contestants), filed this election contest action in their individual and official capacities on November 20, 2020. Melissa Mentele, Charles Parkinson, Randolph Seiler, and William Stocker (Intervenors) officially intervened in this action on December 1, 2020. Contestants filed a Joint Motion for Summary Judgment on December 23, 2020. South Dakota Attorney General Jason Ravensborg (Defendant) and Intervenors filed separate Motions for Judgment on the Pleadings on December 23, 2020. A Motions Hearing was held on January 27, 2021.

ISSUES

- 1. Whether an election contest was the proper procedure with which to bring this lawsuit.**

STANDARD OF REVIEW

A motion for judgment on the pleadings provides an “expeditious remedy to test the legal sufficiency, substance, and form of pleadings.” *Burlington N. R. Co. v. Strackbein*, 398 N.W.2d 144, 145 (S.D. 1986) (further citations omitted). “It is a proper remedy only when no issue of fact is raised” and deals “only with questions of law arising from the pleadings.” *Id.* A motion for summary judgment is appropriate if “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” SDCL 15-6-56(c).

ANALYSIS

Election Contest

Defendant and Intervenors argue an election contest is not the proper cause of action. Contestants respond that the placement of a proposed amendment to the South Dakota Constitution on a general election ballot constitutes an “election,” subject to South Dakota’s election contest procedures and therefore an election contest is the proper procedure with which to bring this action.

A “contest,” as used in SDCL ch. 12-22-1 to 12-22-28, is defined as “a legal proceeding, other than a recount, instituted to challenge the determination of any election under the provisions of this title, or any municipal, school, or township election.” SDCL 12-22-1. The definition of “election,” as used in SDCL ch. 12, is “any election held under the laws of this state.” SDCL 12-1-3(2). An election contest as to a submitted question may be instituted by “any registered voter who was entitled to vote on a referred or submitted question.” SDCL 12-22-3. However, anybody contesting a submitted question must have the permission of a judge of the court where the action is filed. *Id.* An election contest is a “challenge of the election process itself.” *Larson v. Locken*, 262 N.W.2d 752, 753 n.1 (S.D. 1978).

“The basic question in an election contest is whether the election, despite irregularities, resulted in a free and fair expression of the will of the voters.” *In re Election Contest as to Watertown Special Referendum Election of October 26, 1999*, 2001 S.D. 62, ¶ 7, 628 N.W.2d 336, 338 (further citations omitted). The purpose of bringing an election contest is to determine whether the “election, despite irregularities, resulted in a free and fair expression of the will of the voters on the merits, and to obtain a new election if it did not.” *In re Petition for Writ of Certiorari as to Determination of Election on Brookings Sch. Dist.'s Decision to Raise Additional Gen. Fund*, 2002 S.D. 85, ¶ 13, 649 N.W.2d 581, 585 (citing *Locken*, 262 N.W.2d at 753 (S.D.1978)). In bringing a successful election contest, the contestants must show “not only voting irregularities, but also show those irregularities to be so egregious that the will of the voters was suppressed.” *Watertown Special Referendum Election of October 26, 1999*, 2001 S.D. 62, ¶ 7, 628 N.W.2d 336, 338.

Here, Contestants make no mention of any alleged voting irregularities during the 2020 General Election. Instead, they argue Amendment A was placed on the ballot in violation of the South Dakota Constitution. They urge the mere placement of Amendment A on the ballot is an “election” which would be subject to an election contest. The fact Amendment A may have been placed on the ballot in violation of South Dakota’s Constitution does not mean there were “egregious” voting irregularities with the election process. *In re Election Contest as to Watertown Special Referendum Election of October 26, 1999*, 2001 S.D. 62, ¶ 7, 628 N.W.2d 336, 338. There were also no allegations of irregularities in how the 2020 General Election was conducted. *Locken*, 262 N.W.2d at 753. Contestants have not shown how placing Amendment A on the 2020 General election ballot suppressed the “will of the voters.” *In re Election Contest as to Watertown Special Referendum Election of October 26, 1999*, 2001 S.D. 62, ¶ 7, 628 N.W.2d 336, 338. Contestants’ substantive arguments are directed at whether Amendment A violated the South Dakota Constitution, not at alleged irregularities that took place during the 2020 electoral process.

Contestants cite to *Bienert v. Yankton School Dist.*, 63-3 as authority that an election contest is an appropriate cause of action. 507 N.W.2d 88, 90 (S.D. 1993). In *Bienert*, plaintiffs commenced an action which sought an injunction to void the results of an election concerning the construction of a new high school. *Bienert*, 507 N.W.2d at 89. Plaintiffs alleged the election did not meet the statutory guidelines (due to faulty notice and ballot) for a bond election. *Id.* at 90. The Court held equitable relief was not proper in this situation because a legal basis for holding the election still existed. *Id.*

In its reasoning, the Court held no authority exists to legally hold an election when a petition is invalid. *Id.* In a situation where an election could not have legally been held, equitable relief is proper. *Id.* The South Dakota Supreme Court has stated that a petition lacking the requisite number of qualified signatures is one such situation where an election may be voided. *Id.* (discussing *Gooder v. Rudd*, 38 S.D. 197, 160 N.W. 808 (1916)). Another situation where an election could be voided would be if the office being voted on does not legally exist. *Bienert*, 507 N.W.2d at 90 (discussing *Hurley v. Coursey*, 64 S.D. 131, 265 N.W. 4 (1936)). These cases support the concept that in an election contest cause of action pursuant to SDCL ch. 12-2, the focus of whether a petition is valid depends upon compliance with the election procedures to determine whether a legal basis existed to hold the election.

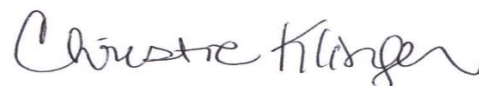
In the current case, Contestants argue Amendment A was in violation of the South Dakota Constitution when it was placed on the ballot. Based on South Dakota Supreme Court precedent, the legal basis for an election does not depend on the substance of the petition, but on compliance with the election process. There are no allegations of defective signatures or an otherwise defective petition. The signatures in this case were valid and the number adequate. In fact, there is no allegation that the election process or requirements for a petition were not followed. Thus, there was no irregularity in the process complained of. An election contest's purpose is to determine whether an election resulted in a "free and fair expression of the will of the voters on the merits . . ." *In re Petition for Writ of Certiorari as to Determination of Election on Brookings Sch. Dist.'s Decision to Raise Additional Gen. Fund*, 2002 S.D. 85, ¶ 13, 649 N.W.2d 581, 585.

An election contest is not the appropriate cause of action based on the Contestants' allegations. Contestants' allegations are not related to the "electoral process" surrounding the 2020 General Election as it relates to Amendment A. Rather, their claims center around whether Amendment A is constitutional and whether it should have been on the ballot to begin with. Contestants have not alleged any irregularities during the 2020 General Election, much less shown anything suggesting the will of the voters was suppressed. As a result, the issues alleged are not appropriately resolved in an election contest cause of action. Therefore, the election contest is dismissed and all other issues identified by the parties are moot.

CONCLUSION

Defendant's and Intervenors' Motions for Judgment on the Pleadings are granted, and this matter is dismissed. This Court's Order of even date shall incorporate this memorandum decision.

BY THE COURT



Christina Klinger
Circuit Court Judge