No. 77300-9

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SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Recall of:

James E. West,

Mayor of the City of Spokane, Appellant

Amicus Curiae Brief

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ISSUES PRESENTED

1) Whether the ballot synopsis based upon commonly read newspaper articles and electronic communications generated by Mayor James West and other evidence is factually sufficient?

2) Whether the Washington State Constitution and the Revised Code of Washington are drafted to protect the rights of the non-legally trained voting public by allowing a Superior Court Judge to "correct" a ballot synopsis?

3) Whether James West's action of recommending an individual for an internship, after having a sexually charged conversation, would be outside of his discretionary functions and constitute misfeasance?

STATEMENT OF THE CASE

On May 18, 2005, Shannon M. Sullivan initiated an action to recall James West, as Mayor of the city of Spokane ("Mayor West"). (CP 6-15). The Superior Court held a hearing on June 13, 2005, in which it admitted additional evidence and heard the testimony of Ms. Sullivan in an effort to determine if there was a factual and legal basis for the charges against Mayor West. (CP 85).

Judge Matheson concluded that charge II of the ballot synopsis was legally and factually supported in light of the entire record (RP 45:18-46:1). He then corrected the ballot synopsis pursuant to RCW

29A.56.140, to ensure that it complied with RCW 29A.56.110. (CP 89). Mayor West has appealed the Superior Court's findings and actions.

SUMMARY OF THE ARGUMENT

The trial court did not err when it found the ballot synopsis factually sufficient. In order to be factually sufficient, a ballot synopsis must include the approximate dates in which the offensive conduct took place, the name of the person who committed the behavior, and a reasonable basis for the petitioner's belief that the charges are true. RCW 29A.56.110. Here, the court ascertained these very facts from the ballot petition, the sworn testimony of Shannon Sullivan, widely circulated newspaper articles, and transcripts from electronic conversations in which Jim West participated. (RP p. 45 ll. 18 – p. 46 ll. 3; CP 52-84). Although the trial court is not to question the veracity of the assertions against Mayor West, the Superior Court was required to evaluate the factual and legal sufficiency of the allegations, and is permitted to look beyond the wording of the petition to determine if there is sufficient evidence to support the charge of misfeasance. *In re: Recall of Beasley*, 128 Wn. 2d 419, 427, 908 P.2d 878 (1996) (Court not to consider truth of allegations; Court should look beyond the petition to determine factual basis of charge). This is precisely what occurred and Judge Matheson found that

charge II of the allegations was factually and legally sufficient in light of the entire record.

Nevertheless, the original ballot synopsis as drafted by the prosecutor failed to include certain facts that were established by the record. Consequently, pursuant to RCW 29A.56.140, the Superior Court Judge was required to correct the ballot synopsis to include these facts to ensure that the synopsis contained the requisite specificity required by RCW 29A.56.110. This act by the trial court was not only within it's discretion, but was required under the statute. RCW 29A.56.140.

Mayor West defends his actions by claiming that they were discretionary and therefore cannot qualify as misfeasance. The allegations in the ballot synopsis, however, charge Mayor West with drafting a letter of recommendation for an intern in an effort to obtain personal gratification through his relationship with the teenager. (CP 32). The Court is required to assume that these allegations as true. *In re Recall of Wasson*, 149 Wash. 2d 787, 792, 72 P.3d 170 (2003). Therefore, even if Mayor West's acts were discretionary, they were clearly an abuse of discretion because they were done for untenable reasons. *Cole v. Webster*, 103 Wash. 2d 280, 284-85, 692 P.2d 799 (1984) (An abuse of discretion demonstrated when discretion exercised for "untenable reasons.")

Consequently, Mayor West cannot avoid the recall petition by simply claiming that his acts were discretionary.

ARGUMENT

I. THE BALLOT SYNOPSIS PROPOSED BY SHANNON SULLIVAN AND CORRECTED BY JUDGE MATHESON WAS FACTUALLY SUFFICIENT.

In order to be deemed factually sufficient a recall petition must:

> State the act or acts complained of in concise language, give a detailed description including the approximate date, location and nature of each act complained of...and be verified under oath that [the petitioners] believe the charge or charges to be true and have knowledge of the alleged facts upon which the stated grounds for recall are based"

Matter of Lee, 122 Wash. 2d 613, 616, 859 P.2d 1244 (1993), *citing In re Wade* 115 Wash. 2d 544, 547, 799 P.2d 1179 (1990).

Clearly, Shannon Sullivan's ballot synopsis as corrected by Judge Matheson (hereinafter "Amended Ballot Synopsis")[1] meets this

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[1] The Amended Ballot Synopsis reads as follows:

> Between March 8 2005 and April 9, 2005, Mayor James E West used his elected office for personal benefit. On March 21, 2005 he authored a letter intending to help obtain a student internship with the city of Spokane for a person he believed to be an 18 year-old high school student. During a series of internet conversations, before and after the letter, Mayor West sent a photograph of himself to the person, raised issues of sex, discussed dating, and urged the person to

requirement. It should be noted that Appellant does not challenge or argue that the Amended Ballot Synopsis is factually insufficient.[2] Rather, Appellant offers two arguments regarding factual sufficiency: (1) that the original Ballot Synopses drafted by the prosecutor lacked factual sufficiency; and (2) Judge Matheson lacked the authority to correct the synopsis.

A. The Original Ballot Synopsis was Factually Sufficient When Viewed in Light of the Entire Record.

To be factually sufficient, the petition must state in detail the acts complained of, and the petitioner must have knowledge of identifiable facts that support the charges. RCW 29A.56.110; *In re: Recall of Pearsall-Stipek*, 141 Wash. 2d 756, 765, 10 P.3d 1034 (2000). In other words, there must be factual support for the allegations of misfeasance, malfeasance or a breach of the oath of office. *Id.*

> keep Mayor West's identity a secret. Mayor West admits these conversations. Offering to help obtain a student internship under these circumstances was an improper exercise of an official duty. (CP 89)

[2] "It is well settled that a party's failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error." *Emmerson v. Weilep*, 126 Wn.App. 930, 940-41,110 P.3d 214 (2005). Mayor West cannot, therefore, now assert that the charges as reflected in the Amended Ballot Synopsis are factually insufficient.

To establish that the charges were factually sufficient, Ms. Sullivan presented to the Superior Court her ballot synopsis as originally drafted[3] along with additional materials including sections of the City of Spokane Personnel policy (CP 58-67), two widely publicized Spokesman-Review articles (CP 68-71, 79-81), an affidavit of Cherie Rodgers (CP 72) and three e-mails generated by Mayor James West. (CP 73-78, 82-84). She also submitted to voir dire from the Superior Court.

Judge Matheson, after reviewing the evidence submitted by the parties and taking testimony from Ms. Sullivan, determined that charge II was complied with the statutory requirements. Pursuant to RCW 29A.56.140, he then complied with his statutory duty to correct the ballot synopsis by ensuring that the specific facts, as demonstrated by the record, were included in the ballot synopsis so that the charge, on its face, alleged that Mayor West acted improperly. RCW 29A.56.140; CP 92.

The Appellant objects to the Judge's use of evidence beyond the wording of the petition when evaluating the sufficiency of the petition. (App. Brief, p. 16-17). Yet, it is well established that the Court may go beyond the record to determine if there is a factual basis for the charges. *In re Recall of Beasley*, 128 Wash. 2d 419, 427, 908 P.2d 878 (1996); *In re*

[3] Charge II James E. West, Mayor of the City of Spokane, committed acts of misfeasance

Recall of Anderson, 131 Wash. 2d 92, 95, 929 P.2d 410 (1997); *In re Recall of Sandhaus*, 134 Wash. 2d 662, 669, 953 P.2d 82 (1998). The duty of the trial court is not to verify the truth of the factual assertions; rather the trial court is only to ensure that the petitioner have a reasonable basis for such assertions. *Beasley*, 128 Wash. 2d at 427. This is precisely what Judge Matheson did. He viewed the entire record, determined there was a factual basis supporting charge II and corrected the charge to ensure that it met the specificity requirements of RCW 29A.56.110. The Court cannot be restricted by a limitation to only the four corners of the petition.

Yet, Mayor West argues time and again that the trial court erred by looking beyond the "face of the petition" in evaluating whether Ms. Sullivan had adequately alleged a cause that can justify the recall. (*A's Brief, p. 12-15, 16-17*). This argument directly contradicts the very reason that the recall provisions were amended to require a showing of cause. As explained by this Court in *Estey v. Dempsey*, 104 Wn.2d 597, 601-02, 707 P.2d 1338 (1985), prior to the revisions of the recall statutes, Washington courts had adopted a *narrow* scope of review of the sufficiency of the recall charges (similar to that proposed by Mayor West). This encouraged to two abuses:

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in that: he solicited internships for young men for his own personal uses. (CP 19)

(1) The charges, though adequate on their face as cause for recall, may lack any factual basis whatsoever;

(2) The charge may be entirely unrelated to the dispute; the real political issue or dispute between the recall petitioners and the elective officer may be submerged beneath the rhetoric of the charge.

Id.

For these reasons the recall statutes were amended to *broaden* the scope of the trial court's review of the allegations to protect public officials from the harassment of recall elections by ensuring that there is sufficient evidence of wrong doing. *Cole*, 103 Wn.2d at 283. Yet, the Appellant would have this Court adopt a very narrow review of the allegations – limited to the face of the petition – ignoring the trial court's responsibility to conduct a broad review in order to protect the Appellant himself. Mayor West's position is clearly without merit.

II. The constitutional Right of Individuals to Recall Elected Officials was Protected when the Superior Sourt Judge Corrected the Ballot Synopsis Under Authority of RCW 29A.56.140.

A. Employing Traditional Tools of Statutory Constructions, RCW 29A.56.140 Is Properly Read as Requiring the Superior Court to Correct Inadquate Ballot Synopses.

1. A Superior Court Judge has an affirmative duty to correct an inadequate ballot synopsis.

In relevant part RCW 29A.56.140 provides, "The superior court **shall** correct any ballot synopsis it deems inadequate." (emphasis added). The use of the word "shall" requires the court to correct a synopsis it deems inadequate. The word "shall" creates a duty; by selecting "shall" instead of "may," the legislature manifested a clear intent to compel a Superior Court judge to remedy any ballot synopsis he or she finds inadequate.

2. When the legislature selects words for a statute, these words must be interpreted as having their plain meaning.

"The fundamental object of statutory interpretation is to ascertain and give effect to the intent of the legislature which is done by first looking to the plain meaning of words used in a statute." *Enter. Leasing, Inc. v. City of Tacoma, Fin. Dep't.*, 139 Wash. 2d 546, 552, 988 P.2d 961 (1999). In construing RCW 29A.56.140, this Court should apply the plain meaning of the words "correct" and "inadequate."

The Appellant asks this court to adopt an extremely narrow definition of the word "correct", (App. Brief, p. 24-26). In actuality the word correct has many definitions. The word "correct" is primarily defined as "to make right." MERRIAM-WEBSTER DICTIONARY, 1997. Correct is also commonly known to be synonymous with words and

phrases such as: "alter," "ameliorate," "better," "clean up," "change," and "debug." ROGET'S THESAURUS, 2005. Employing the plain meaning doctrine, the Superior Court must "correct" synopses that are factually sufficient but improperly written.

In addition, words in a statute must not be read in isolation, but must be considered in their appropriate context. *State v. Roggenkamp*, 153 Wash. 2d 614, 106 P.3d 196 (2005). Regarding RCW 29A.56.140, the word "shall" is used before "correct," thus imposing an affirmative duty on the superior court to ensure that that a ballot synopsis would properly reflect the factual record.

Analysis of RCW 29A.56.140 would not be complete without including the plain meaning of the word "inadequate." "Inadequate" is defined as "not adequate; insufficient." MERRIAM-WESBTER DICTIONARY, 1997. Thus, if the synopsis is deemed to fall short of the statutory requirements, it is not adequate for its stated purpose. Any petition that includes procedural errors, substantive errors, insufficient facts or other mistakes would be "inadequate" under the plain meaning of that term. The Superior Court has been charged by the legislature to determine if a ballot synopsis is inadequate and, more importantly, correct that same synopsis to meet statutory requirements.

Applying traditional tools of statutory interpretation to RCW 29A.56.140 reveals a bright-line rule for superior courts: once a judge has deemed a synopsis inadequate, it is his or her duty to correct it. Accordingly, and contrary to appellant's contentions that he overstepped his authority, Judge Matheson's corrections to Ms. Sullivan's petition simply complied with the statutory mandate that he "correct any ballot synopsis [he] deems inadequate." RCW 29A.56.140.

B. A NARROW CONSTRUCTION OF THE WORD "CORRECT" WOULD VIOLATE PUBLIC POLICY AND LEAD TO ABSURD RESULTS

1. Public policy and the Washington State Constitution favor participation from average citizens without advanced legal training.

A narrow definition of the word "correct" offends public policy by denying voters their sole remedy outside of a regularly scheduled election. The recall of elected officers is available to any legal voter of this state. WA. CONST. art. I, § 33 and 34. Mayor West is not subject to re-election until 2007. Therefore, the regular electoral remedy would be inadequate for Ms. Sullivan's complaint.

The provisions in RCW 29A.56.110-.270 protect elected officials from frivolous lawsuits. However, these statutes are not meant to foreclose pro se litigants from legitimate remedies simply because they

fail to include the "magic words" in their petition. In recognition of this fact, the legislature granted the superior court the authority to "correct" any ballot synopsis it deemed inadequate. As such, a broad interpretation of the word "correct" is consistent with a public policy that provides a means by which every-day citizens become involved in their civic government.

2. **Interpretations of statutes that lead to absurd results are not favored.**

A narrow construction of "correct" in 29A.56.140 would tie the hands of the judiciary and lead to absurd results. A statute must be construed to effect its purpose and avoid a strained or absurd consequence. *State v. Stannard,* 109 Wash.2d 29, 36, 742 P.2d 1244 (1987). If a judge can consider only the face of the petition when evaluating its sufficiency, that same judge would be forced to ignore the context, intent, and legal inexperience of the petitioner when determining the adequacy of a ballot synopsis.

In the present case of Mayor West, a narrow construction of the word "correct" would lead to absurd results. If the Court accepts Appellant's position that Judge Matheson was to "correct" only the spelling errors and clerical mistakes, this Court would effectively tell the judge to ignore the other documents supporting the petition, the testimony

provided at the hearing, and the totality of all evidence presented to him, in contradiction of well established clear authority. *Beasley*, 128 Wash. 2d at 427; *Anderson*, 131 Wash. 2d at 95; *Sandhaus*, 134 Wash. 2d at 669. As a result, Ms. Sullivan's petition would be denied on its face, despite the ready availability of admissible evidence as to Mayor West's misfeasance. The petition would be rejected because Ms. Sullivan failed to follow strict pleading guidelines, not because her petition lacked merit or a reasonable chance of success. As illustrated by this scenario, a narrow interpretation of the word "correct" would bind the hands of justice and unduly limit the discretion vested in the superior court.

III. APPELLANT'S OTHER DEFENSES LACK MERIT

In an effort to demonstrate that the decision of the Superior Court was erroneous, Mayor West offers two additional arguments that will be addressed here. Both are without merit.

A. MS. SULLIVAN HAS THE REQUISITE KNOWLEDGE OF THE UNDERLYING FACTS FOR THE CHARGE

Appellant argues that Ms. Sullivan lacked the requisite knowledge of the underlying facts of the charges. (*A's Brief, p. 17-20*). Although Mayor West concedes that Ms. Sullivan was not required to have personal knowledge of the offensive conduct (*Id*). Mayor West argues that "unverified information from an unnamed source contained in newspaper

were made, 2) when they were made, 3) the context in which they were made, or 4) how they related to the decision..." *Beasley*, at 430. In the instant case, by contrast, we know: 1) to whom the comments were made (from Mayor West to "MotoBrock"), 2) when they were made, 3) the context in which they were made (online conversations in a Gay.com chat-room and emails), and 4) how they related to the decisions being made (Mayor West, after engaging MotoBrock in the chat-room, recommends an internship). As such, Appellant's reliance of *Beasley* is misplaced.

B. MAYOR JIM WEST'S ACTIONS CONSTITUTE AN ABUSE OF DISCRETION.

Appellant alleges that his letter of recommendation for an internship on behalf of a person he believed to be an eighteen year-old senior in high school (CP 78) was within his discretion as mayor, and therefore cannot qualify as misfeasance. This is incorrect. Discretion implies knowledge and prudence and that discernment which enables a person to judge critically what is correct and proper. *Merritt Sch. Dist. 50 v. Kimm*, 22 Wn.2d 887, 891, 157 P.2d 989 (1945); *Ledgering v. State*, 63 Wn.2d 94, 102, 385 P.2d 522 (1963). A clear abuse of discretion may be shown by demonstrating the discretion was exercised in a manner which was manifestly unreasonable or exercised on untenable grounds **or for untenable reasons**. *Wilson v. Board of Governors*, 90 Wn.2d 649,

656,585 P.2d 136 (1978), *cert. denied*, 440 U.S. 960 (1979) (emphasis added).

The Amended Ballot Synopsis alleges that Mayor West provided the letter of recommendation on behalf of what he believed was a high school student while at the same time engaging in sexually explicit interactions. (CP 89-90). In other words, Mayor West offered the recommendation in his official capacity for personal (sexual gratification), rather than official reasons. The Court must accept these allegations as true. *Wasson*, 149 Wash. 2d at 792. Consequently, insofar as Mayor West's decisions to encourage and then recommend a teenager for an internship were discretionary, those acts were based upon clearly untenable reasons and constitute an abuse of discretion.

CONCLUSION

The Court should adopt the legal analysis advanced in this brief, and resolve this appeal accordingly.

RESPECTFULLY SUBMITTED this 5th day of August, 2005.

By: _____
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APPENDIX

RCW 29A.56.140
Determination by superior court -- Correction of ballot synopsis.
Within fifteen days after receiving the petition, the superior court shall have conducted a hearing on and shall have determined, without cost to any party, (1) whether or not the acts stated in the charge satisfy the criteria for which a recall petition may be filed, and (2) the adequacy of the ballot synopsis. The clerk of the superior court shall notify the person subject to recall and the person demanding recall of the hearing date. Both persons may appear with counsel. The court may hear arguments as to the sufficiency of the charges and the adequacy of the ballot synopsis. The court shall not consider the truth of the charges, but only their sufficiency. An appeal of a sufficiency decision shall be filed in the supreme court as specified by RCW 29A.56.270. The superior court shall correct any ballot synopsis it deems inadequate. Any decision regarding the ballot synopsis by the superior court is final. The court shall certify and transmit the ballot synopsis to the officer subject to recall, the person demanding the recall, and either the secretary of state or the county auditor, as appropriate.
[2003 c 111 § 1410. Prior: 1984 c 170 § 4. Formerly RCW 29.82.023.]

Article I Sections 33, and 34 of the Washington State Constitution

ARTICLE I

SECTION 33 RECALL OF ELECTIVE OFFICERS.
Every elective public officer of the state of Washington expect [except] judges of courts of record is subject to recall and discharge by the legal voters of the state, or of the political subdivision of the state, from which he was elected whenever a petition demanding his recall, reciting that such officer has committed some act or acts of malfeasance or misfeasance while in office, or who has violated his oath of office, stating the matters complained of, signed by the percentages of the qualified electors thereof, hereinafter provided, the percentage required to be computed from the total number of votes cast for all candidates for his said office to which he was elected at the preceding election, is filed with the officer with whom a petition for nomination, or certificate for nomination, to such office must be filed under the laws of this state, and the same officer shall call a special election as provided by the general election laws of this state, and the result determined as therein provided. [AMENDMENT 8, 1911 p 504 Section 1. Approved November, 1912.]
SECTION 34 SAME.
The legislature shall pass the necessary laws to carry out the provisions of Section thirty-three (33) of this article, and to facilitate its operation and effect without delay: Provided,

That the authority hereby conferred upon the legislature shall not be construed to grant to the legislature any exclusive power of lawmaking nor in any way limit the initiative and referendum powers reserved by the people. The percentages required shall be, state officers, other than judges, senators and representatives, city officers of cities of the first class, school district boards in cities of the first class; county officers of counties of the first, second and third classes, twenty-five per cent. Officers of all other political subdivisions, cities, towns, townships, precincts and school districts not herein mentioned, and state senators and representatives, thirty-five per cent. [AMENDMENT 8, 1911 p 504 Section 1. Approved November, 1912.]

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of August, 2005, a true and correct copy of the foregoing AMICUS BRIEF of BRANT L. STEVENS and MARK D. HODGSON was:

[ ] mailed, with first class postage prepaid thereon;
[ ] mailed certified with first class postage thereon;
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