9-8-2009

City of Huetter v. Keene Respondent's Brief Dckt. 35470

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 35470-2008

CITY OF HUETTER, an Idaho municipal corporation,

Plaintiff-Respondent

v.

BRADLEY W. KEENE and JENNIFER L. BROWN,

Defendants-Appellants

RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District of the State of Idaho
In and For the County of Kootenai

Honorable Lansing L. Haynes, District Judge

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STATEMENT OF THE CASE

Pursuant to Idaho Appellate Rule 35(b), the Respondent City of Huetter's Statement herein is limited to the extent to which "respondent disagrees with the statement of the case set forth in appellant's brief."

I. NATURE OF THE CASE.

This contest does not "involve[] a contest to Keene's right to hold office as mayor." Keene App. Br. p. 1. Keene's continuing mischaracterization that this case involves an election contest or should be viewed as a *quo warranto* proceeding is unsupported by both the facts and the law. Tr. p. 27, l. 16-17, p. 28, l. 12-19; R. pp. 6-7, 10. Keene's frivolous and unsubstantiated arguments in this regard appear designed as "red herrings" to distract this Court from the true nature of the case.

The City of Huetter brought this case as a request for declaratory judgment and injunction only. R p. 1. The City of Huetter requested the trial court "declare rights, status, and other legal relations" of Keene and Brown to the City. R p. 2. The City of Huetter requested declaratory judgment and injunction because of Keene's disruptive behavior at City Council meetings that disabled the City from proceeding with its lawful business. R. p. 2.

Keene's Brief states, "[t]he [City of Huetter's] petition contested Keene's and Brown's right to continue to hold office as incumbents." Keene App. Br. P. 1. While this is an artful twist of language, it is incorrect. Looking for clarity from the trial court, the City argued below that Keene must have disqualified himself as mayor by not remaining a qualified elector during his

term of office. R. p. 7. In fact, the City argued below that pursuant to Idaho law Keene and Brown "became ineligible to hold office," because they did not respond to the electoral challenge and were dropped from the voter registration rolls. R. p. 7. There is no "elections contest" in this case. There is the City's request for clarification of the statutory impact on the City of Keene's decision not to respond to a valid and lawful electoral challenge. R. pp. 7, 9.

II. COURSE OF THE PROCEEDINGS.

Since this matter was heard in District Court, Appellant Brown moved from Huetter, making her ineligible to hold the office to which she was elected, and appellants' counsel's Motion to Withdraw as her counsel was granted March 13, 2009. As a result, the pursuit of this appeal now pertains only to Appellant Keene. Otherwise, the City of Huetter does not disagree with Keene's Statement of the Case related to the course of the proceedings.

III. CONCISE STATEMENT OF THE FACTS.

In Keene's Brief on page four he argues "the election manager testified she veered from statutory requirements on the mailing of the notice of voter challenge and sent the letter certified mail." Keene App. Br. p. 4, l. 8-10. In fact, the election manager, Deedee Beard, never testified she veered from the statutory requirements. Further, Keene's own Brief states Idaho Code § 34-432 "requires that the notice be sent by mail to the mailing address indicated on the elector's registration card." Id. p. 4, l. 3-5. The election manager's notice was sent by mail, and because the statute does not require a particular method of mailing, the election manager did not veer from the statute by sending the notice certified mail.

The last paragraph on page four of Keene's Brief states, "Keene was working 60 hour weeks and his time off did not coincide when [sic] the post office was opened [sic]." In fact, Keene testified that he "was working from 8:00 in the morning until 7:00 or 8:00 at night, Monday through Saturday." Tr. p. 23, l. 1-2. The Coeur d'Alene Post Office is open during the majority of those hours. Further, "Brown informed Keene of what her envelope contained." Id. pp. 4-5. Thus, where Keene's Brief cites stipulated fact 5 to imply support of Keene's inability to *respond* to the certified letter due to his work schedule, that implication cannot be drawn from the record. The fact is that Keene knew the contents of the notice from Kootenai County, but decided not to respond.

In the last paragraph on page six of Keene's Brief, it is stated that Deputy Attorney General Toryanski provided the City a letter dated March 19, 2008 "expressing the opinion that cancellation of voter registration did not result in automatic ouster or a vacancy in office." It is important to the facts of this case, and the City's decision to go to court in the first place, to note the March 19 letter expressed merely an assertion, accompanied by no legal support whatsoever. Thus, the question of vacancy presented itself in full flower, and the City could not proceed with its business without clarity that the mayor could validly act on City business, unless it wanted to encourage potential challenges to its actions, which would not have been reasonable.

The City filed its Request for Declaratory Judgment to Ascertain Status, and Request for Injunction on March 19, 2008. R. p. 1.

ADDITIONAL ISSUES PRESENTED ON APPEAL

1. Did the trial court err when it declared a vacancy existed in the mayoral office of the City of Huetter, pursuant to Idaho Code § 59-901(4)?
2. Is the City of Huetter entitled to attorney's fees on appeal, pursuant to Idaho Code §§ 12-117 or 12-121?

ARGUMENT

I. SUMMARY OF ARGUMENT

Appellant Bradley W. Keene ("Keene") was elected to serve as mayor of the City of Huetter (hereinafter referred to as "Huetter" or "the City") at the municipal election held on November 6, 2007. R. p. 51 at 3. Idaho Code § 50-601 requires a mayor to be a qualified elector at the time of his declaration of candidacy and to "remain[] a qualified elector during his term of office." On election day, voters of the City of Huetter challenged the electoral status of twelve voters, among them Keene. R. p. 51 at 2.

Idaho Code § 34-432 requires that when a voter's electoral status is challenged, a notification of the challenge shall be sent to the challenged voters. Further, within 20 days from the date of mailing the written inquiry, the elector, here Keene, could have "in person or in writing, state that the information on his registration card [was] correct or he [might have] request[ed] a change in the information on his registration card." The Kootenai County Elections Department mailed such individual notifications of challenge to all of the challenged voters with a request for proper and timely response. R. p. 51 at 5. Keene failed to respond to the challenge

mailed to him within the 20 days required by law, even though he knew the contents of the letter required a response. I.C. § 34-432(1). As a result of this elected official's failure to comply with the law, the Kootenai County Registrar of Voters deleted Keene from the registration rolls on January 18, 2008. I.C. § 34-432(2).

On February 14, 2008, Keene attempted to re-register, was refused, but demanded a qualification hearing. R. p. 52 at 9. The Kootenai County Elections Department held the hearing on February 25, 2008 and determined that Keene was qualified to register and, thus, registered him again as a voter on that day. R. p. 52 at 10.

On January 9, 2008, prior to being deleted from the registration rolls, Keene was sworn into the mayor's office to which he was elected. R. p. 51 at 6. In Idaho, as discussed herein below, a person may be elected to public office prior to his qualifications for that office being verified. However, Huetter's City Attorney determined that because Keene had been deleted from the registration rolls and had thus failed to maintain his status as a qualified elector, he had become ineligible to hold office pursuant to Idaho Code § 50-469. R. p. 52 at 8. Accordingly, at a Huetter City Council meeting held on February 13, 2008, the City of Huetter refused to recognize or seat Keene and declared the mayor's office vacant. Id. Due to disagreement among those present as to whether Keene was eligible to hold office, the City Council meeting was unable to proceed. R. p. 4 at 8. Instead, there were verbal altercations, the meeting was not called to order, and councilpersons left the building. Id. Idaho Code § 50-469 does not specify who or what entity must declare a vacancy exists if a person elected fails to qualify for an office, but it does state the mayor and the council shall fill the vacancy. It is likely that the Idaho

Legislature did not envision a declaratory judgment would be required every time a vacancy needed to be declared to exist in an Idaho municipality.

Keene accepted the legal opinion of Huetter's attorney, and appeared at the Kootenai County Elections Office on February 14 to register as a voter. R. pp. 4 at 9, and 52 at 9. Thereafter, Keene obtained counsel and threatened that a lawsuit would be filed in *quo warranto,* arguing that the City ousted him from his elected position. Actually, due to Keene's disruptive behavior, the City was required to go to court to request declaratory judgment on the City's legal opinion, and no election contest was made, and no ouster was envisioned or attempted.

On March 19, 2008, due to continuing disruptions to the City's business and the need for the City to carry forth its business without challenge, Huetter brought an action in District Court requesting declaratory judgment "to declare rights, status, and other legal relations" of Keene to the City of Huetter. R. p. 1.

Based on stipulated facts, trial evidence, and statutory construction of Idaho statutes, the trial court found Keene was not a registered voter from January 18, 2008 to February 25, 2008, with the result that he was not a qualified elector during that time period. R. p. 75 at 8. The Idaho Constitution and statutes provide that: 1) a person fails to be a qualified elector if such person is not a registered voter;[1] 2) a mayor must remain a qualified elector during his or her term of office;[2] and 3) if a person fails to remain a qualified elector during his term of office, a vacancy is created.[3] Keene was not a registered voter for over a month, and thus was not a

[1] Idaho Const. Art. VI § 2; Idaho Code § 50-402(c).
[2] Idaho Code § 50-601.
[3] Idaho Code § 50-469.

qualified elector during that time. Keene was required as mayor to remain a qualified Elector during his term of office. Therefore, the trial court correctly declared a vacancy existed in the mayoral office to which Keene had been elected, because he had lost his qualified elector status during his term of office. R. p. 75 at 10.

II. IDAHO STATUTES REQUIRE THAT A MAYOR SHALL REMAIN A QUALIFIED ELECTOR DURING HIS TERM OF OFFICE, THUS THE TRIAL COURT CORRECTLY FOUND THAT KEENE'S FAILURE TO REMAIN SO CREATED A VACANCY IN HIS MAYORAL OFFICE, AND CORRECTLY DECLARED SAID OFFICE VACANT PURSUANT TO IDAHO CODE § 50-469.

Pursuant to facts stipulated to between the parties during trial, it is undisputed that Keene was removed from the voter registration rolls on January 18, 2008 and reregistered on February 25, 2008. R. p. 52 at 7 and 10. Accordingly, the trial court found that he was not a registered voter during this period. R. p. 75 at 8.

A. The trial court determined the intent of the legislative body that adopted Idaho Code § 50-469 using rules of construction and the reasonableness of the proposed interpretations.

At the trial level, a court must determine the meaning and effect of a statute by deriving the intent of the legislative body that adopted the statute. *Ada County Assessor v. Roman Catholic Diocese of Boise*, 123 Idaho 425, 428, 849 P.2d 98, 101 (1993). "Where the language of an ordinance is ambiguous, the Court looks to rules of construction for guidance and may consider the reasonableness of proposed interpretations." *Ada County v. Gibson*, 126 Idaho 854, 856, 893 P.2d 801, 803 (Ct.App.1995).

In this case, the trial court found Idaho Code § 50-469 ambiguous, because the court was not led "to a clear and simple understanding of how that statutes should be applied within the body of Idaho election law." R. p. 72. Thus, it appears the trial court properly exercised its judicial power to interpret the statute to make the requested declaratory judgment in this matter.

On the other hand, as a matter of law, this Court exercises free review over the meaning and effect of Idaho statutes. *J.R. Simplot Co. v. Western Heritage Ins. Co.*, 132 Idaho 582, 584, 977 P.2d 196, 198 (1999); *Mitchell v. Bingham Memorial Hospital*, 130 Idaho 420, 422, 940 P.2d 544, 546 (1997). Therefore, this Court may find Idaho Code § 50-469 is not ambiguous, either in its own language, or in its relationship to other Idaho election laws.

For example, this Court could find that the first phrase of Idaho Code § 50-469, "[i]f a person elected fails to qualify," is the legislature's plain language anticipating electoral challenges such as happened in this case, especially in the light of Idaho Code § 50-427, which allows for challenges at the time of an election. Since challenges made pursuant to Idaho Code § 50-427 could not be resolved until after the election, a person could be elected and still fail to qualify for the office in the future due to such a challenge. This interpretation comports exactly with the facts of this case.

Further, if Keene is incorrect, this Court's agreement with the City's above-stated interpretation would mesh nicely with Idaho Code § 50-601, related to the requirement that a mayor "remain[] a qualified elector during his term of office," because it would recognize that a forward-looking interpretation of Idaho Code § 50-469 is substantiated not only by Idaho Code § 50-427, but by Idaho Code § 50-601.

The City of Huetter does not take issue with Keene's argument that this Court should view Idaho Code § 50-469 in the light of the entire statutory structure. Keene App. Br. p. 11. However, Keene goes on to argue that simply because a city makes a declaration that a person is elected, that such declaration cures a candidate's qualification issue. Id. at pp. 11-12. Following Keene's own argument regarding the entire statutory structure, this argument must fail, because Idaho Code § 50-467 appears before Idaho Code § 50-469 in the Code. Thus, the first phrase of Idaho Code § 50-469 must refer to a time *after* the declaration of election made pursuant to Idaho Code § 50-467. Further, the canvassing of votes and declaration of elected officials made pursuant to Idaho Code § 50-467 will, in almost every conceivable case, happen before resolution of an electoral challenge brought pursuant to Idaho Code § 50-427, which statute refers directly to Idaho Code § 34-432 whereby the County Clerk must resolve said challenges.

Therefore, this court could reasonably find that there is a direct connection between Idaho Code § 50-427 (challenges), Idaho Code § 50-469, (failures to qualify), and Idaho Code § 34-432 (resolution of electoral challenges). This connection would explain the placement of Idaho Code § 50-469 after § 50-467, because a person could be declared to be elected, but an election day challenge under § 50-427 could not be resolved until the County Clerk had initiated and completed the procedures required under Idaho Code § 34-432. Thus, the language of Idaho Code § 50-469 would not be ambiguous either within its own language or the statutory structure: "if a person elected fails to qualify, a vacancy shall be declared to exist . . .."

Keene argues that if Idaho Code § 50-469 is ambiguous, it must be interpreted pursuant to the legislature's Statement of Purpose of the original 1978 bill included as Addendum A to his

Brief, because that Statement of Purpose states, "[t]he act places election procedures in sequence of time and conduct by the city." Keene App. Br. Add. A. However, because a failure to qualify due to an election day challenge and a declaration of vacancy could not possibly be determined by a County Clerk concurrent with or shortly after the canvassing of votes, see Idaho Code § 50-467, or the certification of an election, see Idaho Code § 50-470, Keene's reliance on the Statement of Purpose must fail.

Alternatively, if Keene's Statement of Purpose argument holds water, this Court could consider whether the requirements of Idaho Code § 50-427, and the County Clerk's duties referenced in that statute and found at Idaho Code § 34-432 require the County Clerk to resolve an election day challenge prior to later occurring Title 50 Chapter 4 sections following Idaho Code § 50-469, to wit: §§ 50-470 through 50-479, inclusive. However, this construction would not make sense because Idaho Code § 50-469 explicitly recognizes a person may become elected prior to failing to qualify, and Idaho Code §§ 50-470 related to election certificates, application for recount (§ 50-471), recalls (§ 50-472), initiative and referendums (§ 50-473), and the subsequent miscellaneous provisions of §§ 50-474 through 50-479 relate generally to elections themselves, and how they are to be conducted, and not to how an election day challenge may result in a vacancy. If Idaho Code § 50-469 did not exist at all, there would be no provision for a city's resolution of an election day challenge pursuant to Idaho Code § 50-427, because Idaho Code § 34-432 would allow a County Clerk to remove a person from the voter registration rolls, but a city would thereafter have no ability to declare a vacancy.

In this case, when the City Attorney attempted to inform Keene that he was disqualified from holding office due to his removal from the voter registration rolls by Kootenai County, Keene would not allow the meeting to be called to order, and the City's business was disrupted. R. p. 4. It took the declaratory judgment of the trial court to reaffirm Idaho Code § 50-469, so that Keene would understand that the vacancy declared to exist by the City Attorney was the correct interpretation of that statute pursuant to Idaho law.

B. The trial court correctly found that the Idaho Constitution and Idaho Statutes require that one must be a registered voter to qualify as a "qualified elector."

The trial court correctly found that both Article VI, Section 2 of the Idaho Constitution and I.C. § 50-402(c) include, among other factors necessary to meet the criteria of a "qualified elector," that one must be a "registered voter." This is obvious from the plain and simple language of these sections of the law.

Article VI, Section 2 of the Idaho Constitution provides as follows:

> Every male or female citizen of the United States, eighteen years old, who has resided in this state, and in the county where he or she offers to vote for the period provided by law, *if registered as provided by law*, is a qualified elector.

(emphasis added).

I.C. § 50-402(c) provides as follows:

> A "qualified elector" means any person who is eighteen (18) years of age, is a United States citizen and who has resided in the city at least thirty (30) days next preceding the election at which he desires to vote and *who is registered within the time period provided by law*. A "qualified elector' shall also mean any person who is eighteen (18) years of age, is a United States citizen, *who is a registered voter*, and who resides in an area that the city has annexed pursuant to chapter 2, title 50, Idaho Code, within thirty (30) days of a city election.

(emphasis added).

Where the language of a statute is plain and unambiguous, the court must give effect to the statute as written, without engaging in statutory construction. *State v. McCoy*, 128 Idaho 362, 365, 913 P.2d 578, 581 (1996).

According to the undisputed facts, for the period of time after his election between January 18, 2008 to February 25, 2008 Keene was not a registered voter, and thus the trial court properly found he was not a qualified elector during that period.

C. The trial court correctly found that Idaho Statutes require that mayors must remain qualified electors during their terms of office.

The trial court correctly found that Idaho Code § 50-601 requires that mayors must remain qualified electors during their terms of office. Idaho Code § 50-601 provides, in pertinent part, as pertains to the qualifications for mayor that:

> Any person shall be eligible to hold the office of mayor who is a qualified elector of the city at the time his declaration of candidacy or declaration of intent is submitted to the city clerk and *remains a qualified elector during his term of office*.

(emphasis added).

Again, because the language of the statute is plain and unambiguous, the trial court correctly and logically found that in order to remain a qualified elector, one must be a registered voter. Because Keene was not a registered voter for a period of time during his term of office, the trial court found that he did not remain a qualified elector during his term.

D. It is undisputed that Keene was not a registered voter for a period during his term of office and the trial court, thus, correctly found that he was thereby unqualified to hold office pursuant to Idaho statute.

There are various criteria for qualification for an office under Idaho law. As discussed previously, one way in which one must attain the status of a qualified elector is by being a registered voter. In *Clark* v. *Wonnacott,* 30 Idaho 98, 108 (1917), the Court found that because McFarland, the newly elected assessor office holder in that case, died after his election but before he *qualified* to hold office, Wonnacott, the previous assessor, was legally entitled to continue in office until a new assessor could be elected and shown to be *qualified* to hold the office. In that case, the Court stated that, in Idaho, "the person elected to an office does not become the incumbent of the office until he qualifies." *(Clark,* 30 Idaho at 106.) This case was prior to the 1978 enactment of the present Chapter 4 of Title 50, Idaho Code. However, that set of statutes retains the dual qualification of election and qualification for eligibility to hold the office of mayor. I.C. § 50-469.

Three other Idaho cases cite *Clark: Big Wood Canal Co.* v. *Chapman,* 45 Idaho 380, 263 P. 45 (1927); *White* v. *Young,* 88 Idaho 188, 397 P.2d 756 (1964); and *Bone* v. *Duclos*, 94 Idaho 589, 494 P.2d 1033 (1972). All cite the statutory interpretation that along with election must come qualification of one sort or another. In a case of first impression in Idaho, the Idaho State Supreme Court found statutes required that "[a]n appointee to the office of county commissioner filling a vacancy serves only until his successor is *elected* and qualified." *Bone* v. *Duclos,* 94 Idaho 589, 590 *(1972); Bone* v, *Andrus,* 96 Idaho 291 (1974) (emphasis in original.)

In the instant case, although Keene was elected, he never qualified to hold his office, because resolution by the County Clerk of the election day challenge to his qualifications pursuant to Idaho Code § 34-432 resulted in his being dropped from the voter registration rolls. The trial court found that although Keene had satisfied the "qualified elector" requirements of citizenship, age and residency, to be elected on election day, the facts established that he was not a registered voter from January 18, 2008 to February 25, 2008 and, thus, during that period when he was an elected official, he was not a qualified elector. Based on its finding that Idaho Code § 50-601 requires mayors to remain qualified electors during their terms of office, the trial court correctly found Keene to be unqualified to hold the office of mayor under the statute and that a vacancy existed.

E. The trial court possessed the authority under I.C. § 59-901(4) to determine that a vacancy existed in the mayoral office and so declare such vacancy.

Keene argues that Idaho Code § 50-469 "does not provide that it applies to the circumstance that if a public officer becomes ineligible to hold office that a vacancy shall be declared to exist." Keene App. Br. p. 12. This is technically true due to the use of the word "ineligible" in Idaho Code § 50-601. However, while Idaho Code § 50-469 does not discuss *under which circumstances* it might be appropriate to declare a vacancy to exist, it does simply and clearly provide that "[i]f a person elected *fails to qualify*, a vacancy shall be declared to exist." As discussed above, the trial court found Keene failed to maintain his qualified elector status, and thus it declared a vacancy to exist.

The trial court possessed the authority to make such a declaration under Idaho Code § 59-901, which statute provides how vacancies occur in civil offices. It lists nine different ways in which these vacancies can occur. The fourth way it lists is what applies to the case at hand. It states in pertinent part that "[e]very civil office shall be vacant upon the happening . . . of the following event[] at any time before the expiration of the term of such office . . . [by t]he decision of a competent tribunal declaring [the] office vacant." Therefore, being a competent tribunal, the District Court properly declared that a vacancy existed in the City of Huetter's mayoral position.

III. THE DISTRICT COURT CORRECTLY FOUND THAT IT WAS PROPER FOR THE CITY OF HUETTER TO BRING AN ACTION SEEKING DECLARATORY JUDGMENT AS TO THE RIGHTS, STATUS, AND OTHER LEGAL RELATIONS OF KEENE AND BROWN RELATED TO THE CITY.

Respondent City of Huetter, as Plaintiff in the District Court, brought an action requesting declaratory judgment to determine the "rights, status and other legal relations" of Keene and Brown related to the City. R. p. 1. The trial court found that the facts of the case "present[ed] a concrete justiciable controversy that required[d the] Court to clarify and settle the legal relations between the parties and afford relief from the uncertainty that the situation [had] caused." R. p. 74 at 1. This was the proper finding, because a declaratory judgment is appropriate where there is an actual and justiciable controversy, one that is not "hypothetical" or abstract" in character. *Davidson v. Wright*, 143 Idaho 616, 151 P.3d 812 (2006).

A. I.C. § 34-2007, which specifies who may contest elections, is inapplicable to this case because Huetter did not, and could not challenge Keene's election.

Despite Keene's assertions that the City challenged the *election* of Keene, the City requested declaratory judgment pursuant to the City's determination that Keene, though elected, was an unqualified elector, an event that occurred after he began his term of office. Because Idaho Code § 34-2007 pertains only to who may contest *elections*, and a municipality such as the City is specifically not listed as a lawful contester, the trial court correctly agreed with the City that this statute was not applicable to this case in the face of Keene's initial assertion of that argument. R. pp. 25-26.

Nevertheless, Keene continues to frivolously raise this red herring issue. R. pp. 25-26; Keene App. Br. p. 15. Keene's Brief at page 15 states, the City "conceded it lacked standing to challenge the election of Keene . . . on grounds of in eligibility arising at the time of election," and "[o]n that basis, the trial court found that [Idaho Code § 34-2007] was inapplicable to its analysis." In fact, the City never claimed it had standing under Idaho Code § 34-2007 to bring an election challenge, and never "conceded" any such issue at trial. In fact, it was during trial that Keene finally recognized his assertion that this is somehow an election contest was a failed argument. Tr. p. 39, l. 18-20.

The City never believed it had standing to bring an election challenge, yet Keene's Brief at page 15 states the City "conceded" it lacked standing to challenge the election. The City never stated it had standing to bring election, or its initial complaint would have included such a claim. Keene's claim that this case is an election contest has been frivolous from the beginning, as is his

claim that a *quo warranto* proceeding was or is applicable to this case, as discussed herein below.

Further, Keene's appellate brief, beginning at the second full paragraph of page 15, and continuing on through the first full paragraph of page 16, attempts to find error by making a distinction in the trial court's interpretation of Idaho Code § 50-469, based on the provisions applicable to mayoral office-holding found at Idaho Code § 50-601. Keene argues, if "the trial court had extended construction of Idaho Code § 50-469 to the pre-election eligibility period, it would have recognized that its holdings supplanted the provisions of Idaho Code §§ 34-2001, 34-2007 and 34-2008." Keene App. Br. p. 15. This does not make sense. Explicitly, Idaho Code § 34-2007 does not authorize municipalities such as City to contest an election, because a City is not an elector. Therefore, Idaho Code § 50-469 cannot apply to any part of Title 34's Chapter 20.

It makes much more sense for Idaho Code § 50-469 to be interpreted within the context of Title 50 at Chapter 4 wherein it is found, especially given that an election day challenge could not be resolved by a city, but rather must be resolved by a county clerk pursuant to the last sentence of Idaho Code § 50-427. Further on that point, it must be noted that Idaho Code § 50-427 allows challenges for reasons "such as 'died,' 'moved,' or 'incorrect address.'" It is unlikely that these three examples in the statute refer specifically back to language in Idaho Code § 50-402 related to the definition of a qualified elector by mere coincidence.

Idaho Code § 34-2007 does not apply here, because there is no election contest related to Keene.

B. Idaho Code § 6-602, which provides for actions for usurpation of office, is inapplicable to this case because a *quo warranto* proceeding as defined by this statute was not heard by the District Court, and it would have been improper for to request such action.

As the trial court correctly pointed out, a *quo warranto* proceeding under Idaho Code § 6-602 is properly utilized in an action brought on behalf of the people by a county prosecuting attorney against a person who holds or exercises office without legal authority. The trial court correctly found that since the action brought in the District Court was a declaratory judgment action and not a *quo warranto* proceeding, the statute was inapplicable to the present case.

Keene argues that the trial court's analysis "ignored those portions of I.C. § 6-602 that also address that it covers contests against individuals who hold or exercise the right to office without authority of law." Keene App. Br. p. 15. It is difficult to ascertain exactly what Keene means by this statement, but the fact remains that this was not the type of action brought in the District Court as discussed herein below.

I.C. § 6-602 provides that:

> An action may be brought in the name of the people of the state against any person who usurps, intrudes into, holds or exercises any office or franchise, real or pretended, within this state, without authority of law. Such action shall be brought by the prosecuting attorney of the proper county, when the office or franchise relates to a county, precinct or city, and when such office or franchise relates to the state, by the attorney general; and it shall be the duty of the proper officer, upon proper showing, to bring such action whenever he has reason to believe that any such office or franchise has been usurped, intruded into, held or exercised without authority of law. Any person rightfully entitled to an office or franchise may bring an action in his own name against the person who has usurped, intruded into, or who holds or exercises the same.

Thus, to bring an action under this section "against any person who usurps, intrudes into, holds or exercises any office or franchise, real or pretended, within this state, without authority

of law," the action would need to be brought: 1) in the name of the people of the state; and 2) in this case, because it concerns an office related to a city, by the prosecuting attorney of the proper county. This action was not brought in the name of the people nor was it brought by the prosecuting attorney, so this section does not apply.

Further, it would have been improper for the City to argue to the Kootenai County prosecutor that an action in *quo warranto* was lawful, because the City required declaratory judgment to determine whether Keene occupied the mayoral position "without authority of law," as required by Idaho Code § 6-602. The trial court found a vacancy existed, so if Keene had proceeded to sit at the mayor's position after the trial court's final judgment, Keene would have then been sitting "without authority of law," and City could properly have argued a *quo warranto* action was lawful. Keene did not attempt to sit at the mayor's position after the trial court's final judgment, and thus there were no grounds for the City to bring a *quo warranto* action.

The other manner in which an action can be brought under this section is when a "person rightfully entitled to an office . . . bring[s] an action *in his own name* against the person who has usurped, intruded into, or who holds or exercises the same." (emphasis added). None of Keene's pleadings in this action brought a counterclaim pursuant to Idaho Code § 6-602 alleging Keene had been wrongfully ousted from his position by the City. Thus, Keene either felt he was not "rightfully entitled to [the] office" pursuant to that statute, or the *quo warranto* argument is frivolous and meant to delay both the trial court and this Court from directly pursuing pertinent issues. Whichever may be true, or if a third option exists for why Keene keeps pleading this

issue, however unintelligibly stated by Keene, the fact is Keene did not bring a counterclaim asserting he was rightfully entitled to the office, and Idaho Code § 6-602 does not apply.

IV. CITY OF HUETTER'S REQUEST FOR ATTORNEY'S FEES AND COSTS.

City of Huetter requests payment of its attorney's fees and costs in defense of this appeal pursuant to Idaho Code § 12-117 or § 12-121, and I.A.R. 41, because it believes it is the prevailing party, and that Keene "acted without a reasonable basis in fact or law."

As to Idaho Code § 12-117:

> Idaho Code § 12-117 provides for the award of reasonable attorney fees and costs 'in any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, . . . if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law.

Lane Ranch Partnership v. City, 166 P.3d 374, 381 (ID.2007), citing I.C. § 12-117(1).

Further, as to Idaho Code § 12-121:

> An award of attorney fees is appropriate 'if the law is well-settled and the appellants have made 'no substantial showing that the district court misapplied the law.' *Keller v. Rogstad*, 112 Idaho 484, 489, 733 P.2d 705, 710 (1987), quoting *Davis v. Gage*, 109 Idaho 1029, 1031, 712 P.2d 730, 732 (Ct.App.1985). In this case the Bowles have presented arguments that are largely incomprehensible, unreasonable, and lacking foundation in law. There has been no showing that the district court misapplied the law. I.C. § 12-121 and I.A.R. 41.

In this case, Keene required the City of Huetter to bring a suit and defend on appeal matters related to Idaho Code § 50-469, which has been active in Idaho for over 30 years with no case citations. Keene simply decided to ignore City's declaration of mayoral vacancy. Also, Keene's constant and unreasonable allegations that this case involves an election contest or a *quo*

warranto proceeding is unsupported in the law as relates to an election contest, or to *quo warranto* where Keene did not bring suit or counterclaim related thereto.

Therefore, on those bases, the City of Huetter claims attorney's fees on appeal.

CONCLUSION

The City of Huetter requested declaratory judgment in the District Court to determine the "rights, status, and other legal relations" of Keene to the City. It was and is the City's position that Keene disqualified himself as the mayor of Huetter by not remaining a qualified elector during his term of office.

Based on stipulated facts, trial evidence, and construction of Idaho statutes, the trial court found Keene was not a registered voter during a period of time during his term of office, with the result that he was not a qualified elector during that time period. The trial court's decision was based on its reasoned interpretation of Idaho law. Idaho statutes authorize a District Court to determine whether a vacancy exists in a municipal office, and to declare a vacancy if found.

The trial court found it was proper for the City to bring this action. That court ruled a vacancy existed in the mayoral office to which Keene was elected, because he lost his qualified elector status during his term of office. The City of Huetter respectfully requests this Court uphold the District Court's ruling, and grant its request for attorney's fees on appeal.

Respectfully submitted this 2nd day of September, 2009.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 2nd day of September 2009, I caused to be served two true and correct copies of the foregoing RESPONDENT'S BRIEF by Certified U.S. MAIL with postage prepaid addressed to:

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