12-28-2011

Brannon v. City of Coeur d'Alene Appellant's Reply Brief Dckt. 38417

IN THE SUPREME COURT OF THE STATE OF IDAHO

JIM BRANNON,	**)**	
	)	
Plaintiff-Appellant,	**)**	
	)	**DOCKET NO. 38417-2011**
vs.	**)**	
	)	
CITY OF COEUR D'ALENE, IDAHO, et al,	**)**	
Defendants-Respondents.	**)**	
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REPLY BRIEF OF APPELLANT BRANNON

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Appeal from the District Court of the First Judicial District

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The Honorable Charles W. Hosack, Presiding

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INTRODUCTION

The issues and arguments set forth with extensive references in Appellant Brannon's Opening Brief were essentially avoided by the Respondents. To the limited extent that the Respondents touched on issues they are either already addressed or will be addressed in this reply with appropriate citations to the record, statutes, and case law.

WHY THE ELECTION CONTEST WAS FILED

The *possibility* that an election contest was necessary arose because City Clerk Weathers and independent contractor Kootenai County did not keep the absentee ballot record required by I. C. § 50-451 as of the close of the polls[1] and, as a result of this failure, did not compare it to the number of absentee ballots in the ballot box prior to the counting of the absentee ballots.

I.C. § 50-451 is set forth in plain, usual and ordinary wording. It requires the City Clerk to:

1. Keep a record in his office containing a list of names and precinct numbers of electors making applications for absentee electors' ballots;
2. Keep a record listing the date on which the application was made;
3. Keep a record listing the date on which the absentee ballot was returned;
4. Make a note on the kept record:
   a. If an absentee ballot is not returned;
   b. If an absentee ballot is rejected and not counted.[2]

Weathers testified that she relied upon Kootenai County representatives Dan English and Deedie Beard to keep this record but at no time did she ask to see this record which is necessary to verify that the number of absentee ballots in the absentee ballot precinct ballot box match the

[1] Tr. p. 667, l. 24-25, p. 668, l. 1-12.

[2] The absentee ballot record requirement set forth in 4 (a) and 4 (b) that this information "shall" be noted in the record clearly establishes that the district court's holding that "The record contemplated by Section 34-1101 turns out to be the stack of 2,050 absentee return envelopes" R. p. 2290 is clearly erroneous. Additionally since Plaintiff Brannon established that the November 6, 2009 absentee ballot record documented 9 fewer returned and not rejected absentee ballots than were counted the burden shifted to Respondents to introduce the envelopes if they felt they were evidence of anything. They did not. In fact no witness even suggested that the envelopes constituted the required absentee ballot record.

number that were returned and not rejected. English and Beard did not keep a printed 'hard copy' of the absentee ballot record separate from the Secretary of State's statewide data base.

No absentee ballot record was kept as of the close of the polls and thus no one verified, or attempted to verify, that the number of ballots in the absentee ballot box for the absentee ballot precinct 0073 matched the number of absentee ballots that had been returned and, most importantly, not rejected (voided).[3] [4] It was simply presumed that the number of absentee ballots in the ballot box equaled the number of absentee ballots returned and not rejected. All of the absentee ballots in the absentee ballot box were merely taken from the box and run through the ballot counting machines. The absentee ballot count totaled 2051. Based upon the total ballots counted it was reported that Kennedy received 5 more votes than Brannon in the race for Seat 2.

When absentee ballots are returned to the election office each one is recorded and recorded to a software database provided by the Secretary of State.[5] Beard testified that, at that end of each day, all of the recorded returned absentee ballots were placed into the ballot box.[6]

The morning after the election the machine counted number of absentee ballots, 2051, was inserted into the "District Canvass," and it was printed it at 9:58 a.m. Beard did not recall who prepared the "District Canvass" but she did testify that the daily totals of absentee ballots returned were not added up or compared with the machine count. She also testified that the machine count was not compared with any number totals.[7] [8]

On November 6, 2009, Larry Spencer presented a public records request to the election office to obtain a list of the names of absentee voters whose ballots had been returned by 8:00

[3] Plf. Exhibit 85
[4] See Plf. Exhibit 5, p. 175 "Total Voided".
[5] Plf. Exhibit 90, p. 1, para. 3.
[6] Tr. p. 624, l. 15-25.
[7] Tr. p. 670, l. 6-14.
[8] Tr. p. 670, l. 23-25, p. 671, l. 1-18.

p.m. on election day.[9] [10] Susan Smith had been an election clerk for over ten years and one of her primary duties was the recording of absentee ballot information into the database. Smith complied with Spencer's request and printed off the absentee ballot record from the database into which all returned absentee ballots are input, including rejected absentee ballots.[11]

Smith gave him a public record documenting all of the names of absentee ballot voters who returned their ballots by the close of the election. The public record absentee ballot record, Plaintiff's Exhibit 5, recorded all the information required by I.C. § 50-451:

1. The name and precinct number of each elector applying for an absentee ballot;
2. The date the application was made;
3. The date the elector's absentee ballot was returned;
4. Whether the absentee ballot was rejected and should not be counted.

The database also breaks the returned absentee ballots into totals. It documented:

1. Total Requested: 2047
2. Total Issued: 2047
3. Total Returned: 2047
4. Total Voided: 5

The absentee ballot record given to Spencer, when compared with the machine count reflected on the "District Canvass", revealed that 4 more absentee ballots had been counted (2051) than the <u>total</u> of all absentee ballots (2047) that were returned. Since the absentee ballot record also documented that 5 of the absentee ballots returned were rejected, the comparison revealed that 9 more absentee ballots were machine counted than should have been.[12] The

[9] Tr. p. 320, l. 2-5.
[10] Tr. p. 192, l. 10-14.
[11] Plf. Exhibit 90, p. 1, para. 3.
[12] The following information was not known until trial and is provided here to show what the City's independent contractor knew.
a. Smith testified what occurred after she gave Spencer the absentee ballot record documenting 9 more absentee ballots were counted than should have been. She stated that after she gave Spencer the absentee ballot record that she had a "discussion with someone about this [the fact that the absentee ballot record documented that 9 more absentee ballots were counted than should have been]. Tr. p. 294, l. 20-25. She testified that she told her supervisor, Beard, that she printed off the absentee ballot record for Spencer but she could not recall if she told Beard that it documented 9 more absentee ballots were counted than should have been. Tr. p. 293, l. 2-13.

difference in votes attributed to Brannon and Kennedy in the Seat 2 race was 5 votes and the counting of 9 more ballots than should have been counted is sufficient to change the result of the Seat 2 race. After printing the absentee ballot record, election clerk Smith was aware of the discrepancy between the totals documented on the absentee ballot record and the number of absentee ballots machine counted.

On November 9, 2009, the Coeur d'Alene's City Council met for what it purported was a canvass. The meeting minutes document that the council asked no questions of the presenters Weathers, Beard, and English, that no testimony was given, and that no documents other than the "District Canvass" prepared by the election office the morning of November 4, 2009 and the summary signed by Beard of November 9, 2009, were presented to the city council.[13] [14] [15] The actual "canvass" consisted of merely a motion being made to "accept the canvass of votes [by the county]."[16]

After Spencer realized that despite the 9 absentee ballot difference the 'count' of 2051 absentee ballots had been presented to the city council, he sent an e-mail to Kootenai County Prosecutor, Barry McHugh on November 16, 2009 at 2:42 p.m.[17] Spencer informed McHugh that the "Election Canvass" documented that 9 more absentee ballots were counted than should have been. Late that same afternoon, approximately two hours later, McHugh replied to Spencer's e-mail. McHugh asked Spencer if he had talked to the "folks" at the election office, if he had

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b. Beard testified that she was aware of the 9 vote difference between the 'count' and the absentee ballot record. She stated that she could not recall if she knew this before or after the City council met on November 9, 2009. Tr. p. 669, l. 1-15. This may have been due to the fact that her computer had been "cleaned" of all information before trial. Tr. p. 419, l. 19-25, p. 420, l. 1-2.

c. English testified that he knew about the 9 vote difference between the 'count' and the absentee ballot record "on or about" the day the City council met. Tr. p. 137, l. 20-22.

[13] Plf. Exhibit 87.

[14] Plf. Exhibit 85.

[15] Plf. Exhibit 86.

[16] Plf. Exhibit 86.

[17] Plf. Exhibit 47.

spoken to them; was there a problem, and he stated that if there was a problem he would be happy to follow up with the election office.[18]

The next morning at 8:53 a.m., McHugh sent an e-mail to Spencer.[19] Overnight he had a change of heart.[20] In the e-mail McHugh told Spencer:

> "After reviewing the matter further, it appears that the appropriate thing for me to do is to indicate that there is a method in Idaho Code for you to contest an election. While I can't provide you legal advice, I would suggest you look at Chapter 20 of title 34, Idaho Code. In the event such a contest was filed, my office is responsible for representing the Elections Office in the contested matter. Still, in that capacity I will review any information you provide me on this question."

In short the message from McHugh to Spencer was, go away or file an election contest. McHugh was not going to investigate further. Any further action on his part would be defending the election office, if an election contest was filed, and any information he received would be used for that purpose.[21] An election contest is not something that would be favorably discussed in a seminar on how to make friends and influence people in high places and no doubt McHugh believed that this would put an end to the issue raised by the discrepancy.

When no one will address a discovered ballot and vote count discrepancy sufficient to change the result of an election, conscientious citizens are left with no choice but to file an election contest.

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[18] Plf. Exhibit 47.
[19] Plf. Exhibit 47.
[20] It seems that McHugh's change of heart came as a result of a second absentee ballot report (Plf. Exhibit 8 A) that was, unbeknownst to Spencer, printed on that same day, November 16th. The same county clerk, Smith, testified that that she printed this record but that she could not recall "if it was a request by a patron or a request by a supervisor." Tr. p. 306. This November 16th absentee ballot record documents, consistent with testimony that absentee ballots returned after the election are recorded as rejected (Voided), that 2042 absentee ballots were returned for the election that were not rejected (Voided). Plf. Exhibit 8 A.
[21] McHugh's decision to defend the election office was no doubt due to the county's liability under its contract with the city to pay for the cost of a new election. Def. Exihibit B, p. 3, para. 5 and 6.

Responses to Kennedy's Brief:

Assertion 1: All Laws Followed:
As of 8:00 o'clock p.m. on November 3, 2009 the Kootenai County Election Office had complied with every federal, state and municipal law relating to absentee votes from persons who had a residence and who were living out-of-state/out of country but with an intention to return. K br. p. 25.

Response:

In Idaho municipal elections, when Idaho Municipal Election laws have not been found unconstitutional or preempted by federal law, the Idaho Municipal Election laws are to be complied with. Compliance with federal or state election laws is not relevant.

Municipal laws insuring accuracy in ballot counting

The absentee ballot record is a critical election safeguard and it is an integral step in the checks that are built into Idaho's Municipal Election laws.

I.C. § 50-451 Record of applications for absentee ballots, mandates:

> "The city clerk shall keep a record in his office containing a list of names and precinct numbers of electors making applications for absentee elector's [electors'] ballots, together with the date on which such application was made, and the date on which such absent elector's ballot was returned. If an absentee ballot is not returned or if it be rejected and not counted, such fact shall be noted on the record. Such record shall be open to public inspection under proper regulations." (Emphasis added)

The absentee ballot record documents and verifies all absentee ballots returned in an election. It was not kept at the close of the polls.[22] Chief Deputy Secretary of State Timothy Hurst testified that the failure to keep this record so that the number of legally returned absentee ballots can be verified before counting a "violation of the clerk's duty."[23]

[22] Tr. p. 668, l. 8-12.
[23] Tr. p. 444, l. 5-11.

Election supervisor Deedie Beard testified that all returned absentee ballots are deposited into the absentee precinct ballot box.[24] Because an absentee ballot record was not kept at the close of the polls not a single person involved in the City's election—City Clerk Weathers, County Clerk English, or election supervisor Beard—attempted to verify whether or not the number of absentee ballots returned and not rejected equaled the number of absentee ballots in the ballot box before they were machine counted. The people involved in conducting the election failed to comply with I.C. § 50-464.

I.C. § 50-465 provides that ballots are not to be counted until it is verified that the number of ballots in the ballot box, and the number of ballots returned and not rejected, agree. Beard testified that the persons conducting the election did not verify that the number of absentee ballots counted equaled the number of returned and not rejected absentee ballots.[25] In fact Beard testified that the total number of absentee ballots that were removed from the ballot box was not compared to any other total.[26] The people involved in conducting the election failed to comply with I.C. § 50-465.

I.C. § 50-407 provides that the city council may establish an absentee voting precinct for the city. I.C. § 50-450 provides that when an absentee ballot is returned the absentee ballot shall be deposited in the ballot box and the absent elector's name shall be entered on the poll books the same as though he had been present and voted in person. No poll book was kept for the absentee ballot precinct.[27] The people involved in conducting the election failed to comply with I.C. § 50-450.

[24] Tr. p. 624, l. 23.
[25] Tr. 667, l. 9-12.
[26] Tr. p. 667, l. 9-12.
[27] Tr. p. 673, l. 3-7.

I. C. 50-464 provides that when a ballot box is opened the number of ballots in the box must agree with the number marked in the poll book before any counting occurs. If the number of ballots in the ballot box does not agree with the number of ballots listed in the poll book, the election judges have the authority to correct the situation. The legislature realized that this situation could occur and it addressed it. It placed the precise manner and method of resolving this problem with the election judges.[28] The legislature directed this situation must be addressed and resolved, before the count of absentee ballots commences. This is another check inserted by the legislature to insure that only the correct number of absentee ballots is counted. This check was not done for the absentee ballot precinct (73) because no poll book was kept for it. Those persons conducting this election ignored the requirement that a poll book for the absentee ballot precinct be kept and that its recorded number of cast absentee ballots be compared the number of absentee ballots in the ballot box. I.C. § 50-465 provides that the counting of the votes cast shall not commence until the number of ballots from the ballot box equals the number of ballots the poll book documents should exist. This check was not done because no poll book was kept for the absentee ballot precinct. Surprisingly, Beard testified that that compliance with these two statutory requirements "doesn't happen in Kootenai County."[29]

The persons conducting the election did not follow the election laws required to ensure accurate absentee ballot count accuracy, the built in checks were not followed, thus these checks were not used to insure that only the correct total of returned and not rejected absentee ballots were counted.

[28] Precisely how this situation is to be corrected is not set forth in the statute; probably because of the numerous variables that may be involved in every such situation.
[29] Tr. p. 675, l. 2-6.

Municipal laws establishing who is a "qualified voter."

I.C. § 50-402 and I.C. § 50-443 set forth the limited conditions under which a person who is not actually living in a municipality may vote by absentee ballot. They establish two categories of persons who may be qualified voters; (1) a person whose actual home is at a fixed location, and (2) a person who in the United States service.

A person who is not in the United States service and who has not resided in the municipality for at least thirty (30) days next preceding the election must have his actual fixed principal or primary residence located within the municipality and he must have the present intention of returning to it. He is required to affirmatively make written application for an absentee ballot for the election in which he seeks to vote. A person in the United States service whose most recent fixed principal or primary residence was in the municipality in whose election he seeks to vote by absentee ballot must use a properly executed federal postcard application as provided for in the laws of the United States known as "Federal Voting Assistance Act of 1955."[30] These fundamental eligibility requirements were ignored by the persons conducting the election.

I.C. § 50-445 requires that when an application for an absentee ballot is received the city clerk, before sending the applicant an absentee ballot, must:

1. Examine the records to ascertain if the applicant is registered; and then
2. Ascertain if the applicant is "lawfully entitled to vote as requested."[31]

[30] I.C. § 50-443.

[31] The existence of a registration is only the first step. Once it is verified that the applicant has a voter registration on file the clerk must then investigate whether the applicant is "lawfully entitled to vote as requested." The second step is actually more important than the first. It was not done in this election. The investigation stopped with the location of a registration card; even if it was ten years old.

The people involved in conducting this election failed to comply with I.C. § 50-445. They sent absentee ballots, that were returned and counted, to persons who did not meet the requirements of I.C. § 50-402 and I.C. § 50-443.

In this election with regard to non-residents, not in the United States service, the only check those persons conducting the election made was to determine if the person applying for an absentee ballot had a voter's registration card contained in the Secretary of State's statewide database. To the persons conducting this election, when the registration card was signed even if it was ten years earlier, was not a concern. [32] [33]

Beard testified that the mere presence of a registration card in the statewide database "makes them eligible to vote."[34] Beard testified that the second requirement for each category of absentee ballot applicants, whether an applicant is lawfully entitled to vote as requested in this election, was not even considered or investigated. Instead of investigating whether an applicant who was not in the United States service maintained their principal or primary home or place of abode in which his habitation is fixed and whether he has the present intention of returning to was in the City (as is the case with Canadian residents Paquin, Friend, Farkes, and Dobslaff and California resident Gagnon) it was merely presumed that the applicant's residence was still at the address on the registration card and that the person had the present intention to return.[35] In the case of Sgt. Major Gregory Proft, no investigation was undertaken to determine where his most recent fixed principal or primary residence had been. In Sgt. Major Proft's case she would have easily discovered that it was in Post Falls and that he had never lived in Coeur d'Alene. Beard attempted to defend of not verifying whether or not a person with a registration card on

[32] Tr. p. 629, l. 21-25, p. 635, l. 1-14.
[33] Tr. p. 629, l. 629-632.
[34] Tr. p. 648, l. 10-13.
[35] Tr. p. 633, l. 11-17, p. 635, l. 13-14.

file was "lawfully entitled to vote as requested" in this municipal election by testifying "we're not the election police."[36] If the persons who City Clerk Weathers testified were required to ensure compliance with the Municipal Election laws in the 2009 City election are not the "election police," who was then?

Beard testified that UOCAVA was followed for the municipal election, that a person did not have to apply for an absentee ballot in this municipal election, and that an absentee ballot was automatically sent to out to persons who had previously requested an absentee ballot with a UOCAVA form. Beard testified that under UOCAVA a person does not have to apply for an absentee ballot every year. She testified that under UOCAVA for a person to automatically receive an absentee ballot, a person is only required to have voted in a "general or primary election once in a four-year period.[37] She testified that she just took it upon herself to make a copy of the earlier UOCAVA request, put it into the 2009 election, and send out the absentee ballot.[38] [39]

This is exactly how Denise Dobslaff received an absentee ballot for, and voted in, the 2009 City of Coeur d'Alene General Election. Dobslaff, testified that her primary home or place of abode was Vernon, British Columbia. She had voted in the most recent presidential election, but she did not apply for an absentee ballot for the 2009 municipal election. When she received the absentee ballot, since as a United States citizen she was permitted to vote in a presidential elections, she "Well, I guess I'm entitled to vote [in municipal elections too]."[40] Dobslaff

[36] Tr. p. 639, l. 3-7.
[37] Tr. p. 642, l. 10-12.
[38] Tr. p. 645, l. 13-14.
[39] This is exactly what occurred to Denise Dobslaff. She had voted in the previous presidential election and was sent an absentee ballot for the municipal election without even requesting one.
[40] Tr. p. 857, l. 1-25.

testified that she moved from Coeur d'Alene to Canada in 1988.[41] She testified that she was a "landed immigrant from Canada"[42] and that she doesn't know when she will come back to the United States, but that "I have not ruled out moving back to the states."[43] The district court, despite acknowledging that municipal election laws were different, held Dobslaff was a "Qualified elector."[44]

The people involved in conducting the election failed to comply with the Municipal Election laws on absentee ballots.

> **Assertion 2: Recount.**
> Given the five vote (currently three) margin, candidate Brannon could have asked for an automatic recount. It would have been the same as Magistrate Marano's count.
> K br. p. 8.

Response:

Chief Deputy Secretary of State, Timothy Hurst, testified that the only thing that a recount would have done was verify the number of ballots that were run through the ballot counting machine. It would not show how many absentee ballots were returned. It would not show which ballots were legally received. It would not show whether a ballot that was counted should not have been because it was a rejected absentee ballot nor would it show whether a person voting by absentee ballot was "lawfully entitled to vote."[45]

Judge Marano testimony was clear, as was his affidavit which was also admitted into evidence reiterates his testimony in writing, about exactly what occurred on his June 22, 2010 court ordered count of legal and counted absentee ballots for the 2009 election.[46] He testified

[41] Tr. p. 870, l. 8-9.
[42] A "landed immigrant" is only allowed to leave Canada for a total of three months every five years. Tr. p. 866, l. 10-15.
[43] Tr. p. 864, l. 4-15.
[44] Tr. p. 877-881.
[45] Tr. p. 471, l. 15-25, p. 472, l. 1-2.
[46] Plf. Exhibit 97.

that on June 22, 2010 he was presented all the actual legal and counted absentee ballots by Carrie Phillips, the sole custodian of the 2009 absentee ballots.[47] Carrie Phillips testified that until the absentee ballots were delivered to be counted that the absentee ballots had been kept under lock and key at the Sheriff's office.[48] She testified that she personally observed the absentee ballots transported to her office, in locked ballot boxes for them to be counted by Judge Marano.[49] Judge Marano testified that he counted 2027 legal and counted absentee ballots. He testified to these facts three times and he confirmed his testimony in writing with his affidavit, which is Plaintiff's Exhibit 97. Marano testified he was provided "all of the absentee ballots counted in the 2009 City of Coeur d'Alene General Election" and that he counted a total of 2027 absentee ballots counted in the 2009 City of Coeur D'Alene General Election".[50]

Judge Marano also testified that after he conducted the count on June 22, 2010, he was called by Prosecutor McHugh[51] to count some "other ballots that had been located."[52] He testified that on July 2, 2010 he was given a ballot box labeled Coeur d'Alene write-in ballots 11/3/09 by former election supervisor Beard.[53] At this time Beard was no longer a county employee it had no legal access to any election documents. He opened an envelope labeled: "Valid 0 Invalid 7."[54] Beard retired at the end of November, 2009. On July 2nd Beard was no longer the sole legal custodian of any election materials, let alone ballots, for the 2009 election.[55] The legal custodian of the election documents, Carrie Phillips was not even present. She was told

[47] Tr. p. 372, l. 25, p. 373, l. 1-3.
[48] Tr. p. 597, l. 7-19.
[49] Tr. p. 597, l. 20-25, p. 598, l. 1-4.
[50] Tr. p. 360, l. 6-10, p. 376, L. 5-8, p. 378, l. 16-21 and Plaintiff's Exhibit 97, p. 3, para. 6.
[51] Tr. p. 351, l. 15-16.
[52] Tr. p. 347, l. 22-25.
[53] Tr. p. 348, l. 3-7.
[54] Plf. Exhibit 77. Tr. p. 348, l. 23.
[55] Tr. p. 596, l. 596-597.

about it.[56] On July 14, 2010, Judge Marano was asked to count other documents. He testified that he had "no remembrance" and "can't say for sure" what it was that he counted on that day.[57]

After cross examination of Judge Marano was concluded, in order to erase any question as to what his testimony was regarding the number of legal and counted absentee ballots was that he counted, he was asked a follow-up question to erase any doubt as to the number of legal and counted absentee ballots he had counted.

When Judge Marano was asked for this question, for the third time, how many legal and counted absentee ballots he had counted in compliance with the district court's order, Kennedy's counsel objected.

> "Mr. Erbland: I'm going to object. This is cumulative and it is simply a repeat of the direct examination....
>
> Mr. Erbland: It's in the affidavit. It's in the notes. It's in the testimony.
>
> The Court: I'm painfully aware of all that...
>
> Mr. Erbland: ...This is—the point's been driven home again and again. Why use six nails when one will do?
>
> The Court: I don't know. I don't know...
>
> "Mr. Kelso: Q. Paragraph 6. 'I arrived at a total of 2027 absentee ballots counted in the 2009 City of Coeur d'Alene general election,' correct?
>
> A. Are you asking me again if that was—if I was correct the last time?
>
> Q. Yep.
>
> A. Yes."[58]

The district court's finding that Judge Marano counted 2051 legal and counted absentee ballots is not based upon any competent evidence. The finding that Judge Marano counted 2051 items,

[56] Tr. p. 591, l. 5-8.
[57] Tr. p. 352, l. 18-23.
[58] Tr. p. 378, l. 16-22.

2027 legal and counted absentee ballots plus 7 invalid absentee ballots plus 17 of something that he did not know what they were, is correct. That, however, does not change the fact that Judge Marano, the official appointed by the district court to physically count the legal and counted absentee ballots in existence for the 2009 election, counted 2027 legal and counted absentee ballots.[59]

> **Assertion 3: Marano's count.**
> Marano's count of valid absentee ballots counted in the election confirmed that the count of 2051 absentee ballots given approval at the city canvass was exactly correct. K. br. p. 27.

Response:

For reference, see the discussion regarding the testimony of Judge Marano set forth above. The total number, 2027, has never changed. By any definition of the word "canvass" does not describe the action taken by the City council at its November 9, 2009 meeting. To "rubber stamp"[60] the vote totals presented to it without even so much as looking at any poll book, without even so much as looking at any computer printout of votes or tabulations, without even looking at any other document, and without even failing asking a single question[61] does not constitute a canvass.

> **Assertion 4: Kootenai County not a party.**
> The amended complaint was insufficient because Kootenai County was no longer a defendant. The city clerk, Weathers, was rejoined as a contingent defendant in the event that there was evidence of fraud. K br. p. 9-10.

Response:

The City of Coeur d'Alene's 2009 General Election was just that, the City's election. It

[59] R. p. 1310.
[60] The City's trial attorney's characterization.
[61] See Appellant Brannon's Opening Brief p. 40-45.

was not, and never was intended to be, or could it have been, the Kootenai County's election. Kootenai County conducted its own election on County issues.[62] Assuming, without agreeing, that the city could contract with the county to conduct the city's election, the relief sought (a new election) could only be obtained from the City of Coeur d'Alene. The Court's order in an election contest is directed to the entity holding the election.[63] The City held the election. It certainly did not conduct it according to chapter 4, title 50, of the Idaho Code, but it was certainly the City's election that purported to declare winners in the respective races for seats being contested for the City council. The fact that the City contracted with the County to conduct it for it, does not make it the "County's election." I.R.C.P. Rule 19 (a)(1) provides:

> "A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be a accorded among-tire already-existing parties..."

It is the City's election that has, and is, being challenged. No relief from Kootenai County could be obtained by Brannon. Under the contract with the county the City could have joined the county as a defendant, and sought to have it pay for any claims, losses, actions or judgments for damages or injury arising out of or in connection with the conduct of the election. In other words, it could have sought a judgment requiring the County to pay for a new election and the attorney fees and costs that it incurred. The City chose to not do so.[64] The county employees involved in conducting the city's election witnesses as to how the City's election was conducted and nothing more. Simply put, there was no 'contingency' of fraud necessary to rejoin city clerk Weathers.

Assertion 5: Exempt.

The fact that municipal elections are exempt from chapter 14 title 34 does not mean that

[62] *See* also the Answer prepared by the attorney for the County before it was served and before it was dismissed. At R. p. 1148 and 1149 it asserts the affirmative defenses that the complaint fails to state a claim against "these answering Defendants" because no relief can be granted against it under Title 50, Chapter 4, Idaho Code.
[63] Nelson v. Big Lost River Irrigation Dist., 133 Idaho 139, 141, 983 P. 2d 212 (1999)
[64] Tr. p. 551-552.

> a municipality is prohibited from contracting with the county clerk to conduct its election. K. br. p. 11.

Response:

The legislature's intent in using the word 'exempt' is made clear by the sentence following it in I.C. § 34-1401:

> "**All municipal elections shall be conducted pursuant to the provisions of chapter 4 title 50, Idaho code**, except that they shall be governed by the elections dates authorized in section 34-106, Idaho Code, the registration procedures prescribed in section 34-1402, and the time the polls are open pursuant to section 34-1409, Idaho Code." (Emphasis added)[65]

Except for setting election dates, who is to register voters, and the time that the polls are open, it is the city clerk's statutory duty to conduct the election under the provisions of chapter 4, title 50, Idaho code.[66] The city clerk is specifically given the power to employ persons to assist in the city clerk's carrying out of his election duties.[67] The district court held that under the contract between the city and the county the county is an "independent contractor" and that the city shall have "no control" over the performance of the contract by the county or its employees.[68] [69] It also requires the county to maintain workers compensation insurance over its employees.[70] The city clerk did not employ any "person" to assist her**.** The contract was with Kootenai County, an "independent contractor." Under its contract the city retained literally "no control over...the County or its employees.[71]

Kennedy asserts that a person named Shirley Mix was charged with informing the legislature what House Bill 330 was going to do, or was not going to do, by submitting a

[65] The Statement of Purpose for H 201 that went into effect on January 1, 2011 states that now "the authority to conduct any election is vested with the County Clerk. R. p. 662.
[66] I.C. 50-403; I.C. § 34-1401.
[67] I.C. § 50-404.
[68] I.C. § 50-404.
[69] Tr. p. 103, l. 4-13.
[70] Def Exhibit B, p. 3, para. 4.
[71] Def Exhibit B, p. 3. Para. 4.

"Memo".[72] She was not a deputy attorney general and she was not a legislator. It is not known what her qualifications were, other than acting in some capacity for the Idaho Association of Cities. She didn't testify.

This Court has been confronted with arguments, similar to this one asserted by Respondents, in the past. As this Court has consistently held, as recently as November of this year, an asserted purpose for enacting legislation cannot modify its plain meaning.[73]

Pete McDougall, City Clerk Treasurer from Pocatello did testify. His testimony as documented in the Idaho House State Affairs Committee minutes of March 3, 1993 was:

> "he is in favor of this Bill. He said the intent of this Bill is to remove cities from Title 34 in the conduct of elections. Under the provisions of Chapter 4 of Title 50, cities have a comprehensive election administration statute."[74]

The only other testimony on the intent of H.B. 330 was by Representative Alexander. He testified that H. B. 330 would consolidate election dates, who is responsible to for registering voters, and the hours that the election polls will be open.

This testimony concisely summarizes exactly what the wording of I.C. § 34-1401which specifically provides that all municipal elections shall be conducted pursuant to the provisions of chapter 4, title 50, Idaho code. The only exceptions pertain to election dates, who registers voters, and the hours the polls will be open. When interpreting a statute the Court's primary objective is to derive the legislature's intent in enacting the statute. Statutory interpretation begins with the literal language of the statute. If the statutory language is unambiguous the Court

[72] *See* for convenience, because it is also included in the Clerk's Record, the Kennedy Brief appendix B.
[73] *Verska v. Saint Alphonsus Regional Medical Center, 37574-2010 (IDSCCI) Nov. 9, 2011.*
[74] *See* for convenience, because it is also included in the Clerk's Record, the Kennedy Brief appendix B.

does not engage in statutory construction. The Court applies the statute's plain, usual, and ordinary meaning.[75]

The literal language of the statute could not be any clearer despite the strained attempt by Respondents to argue otherwise. Ambiguity is not present merely because one party offers a different interpretation of the statute's language.[76]

Commencing at page 50 of Appellant Brannon's Opening Brief, the actual text of the bills adopted regarding municipal elections, beginning in 1992 and continuing through amendments in 1993 and the newest legislation effective January 1, 2011, are set forth. The interlineation of language being removed and the underlining of language being added graphically establish the intent of the legislature which is the 2009 City of Coeur d'Alene General Election was required to be conducted by the city clerk pursuant to the provisions of chapter 4, title 50, Idaho Code" except as to election dates, who registers voters, and the time polls are to be open. The Respondents claim that Chief Deputy Hurst supported their assertion. However under questioning he correctly testified Municipal Election laws were to be followed:

> "A. We don't have—Secretary of State's office doesn't have jurisdiction over Title 50 of the Code. My opinion is since it says it in the code, the should maintain it."[77]

Assertion 6: Remedy.

No Idaho court has ever annulled an election and no Idaho Supreme Court decision has set aside, voided or annulled any election. K. br. p. 15.

Response:

The first knee jerk reaction to that assertion is; So? In this regard, an appropriate analogy is this Court's decision in *Edwards v. Industrial Com'n of State, I30 Idaho 457, 943 P. 2d 47 (1997).* In *Edwards*, this Court held that State Insurance Fund practice of not depositing an

[75] *Idaho Power Co. v. Idaho Dept. of Water Resources, 151 Idaho 266, 255 P. 3d 1152 (2011)*
[76] *See Jasso v. Camas County, 37258 (IDSCCI) Nov. 2, 2011*.
[77] Tr. p. 443, l. 11-14.

amount equal to the total amounts of all outstanding and unpaid compensation awards against it with the State's Treasurer, a practice that it had followed for 80 years, did not comply with Idaho law. I.C. § 34-2021 sets forth that in contested elections the court shall confirm or annul the election and if the election contest is in relation to the election of some person to an office the court shall enter judgment declaring the person appearing duly elected to be elected, order the office filled by appointment, or order a new election. In discussing what a district court could or could not do, the district court stated that it would not be a good idea for courts to anoint a new office holder.[78]

Assertion 7: Federal law.
Both the Municipal Code Title 50, Chapter 4 and Title 34 recognize and adopt the federal absentee voter laws. K. br. p. 23.

Response:

There is a critical distinction regarding "federal absentee law" that Kennedy attempts to obfuscate. The Municipal Election Laws adopted by the legislature continued to adhere to the Federal Voting Assistance Act of 1955 (FVAA 1955) and the requirement in order for a non-resident to vote in a municipal election he has to be in the United States Service despite the federal enactment of the Uniformed and Overseas Citizens Absentee Voting Act, (UOCAVA). The Idaho legislature chose to not change the FVAA 1955 of being in the United States service requirement for municipal elections. The Idaho legislature was obviously aware of UOCAVA because it amended the state and county election laws to reference it while still retaining the FVAA 1955 requirement for municipal elections.

County Clerk English testified that he was not really familiar with Idaho's Municipal Election laws. He testified that he doesn't "look at Title 50 much because that's the city code"

[78] May 14, 2010 Hr. T. p. 30, l. 20-21.

and he conceded that the residency requirements are different for municipal elections.[79] [80] English testified that UOCAVA was utilized to determine residency for the City's 2009 election regarding absentee voters despite his being aware that there is a difference in the residency requirements between municipal and state/county elections.[81] Beard testified that she was aware that residency requirements for municipal elections were different than for state and county elections. She testified that absentee ballots for the City's election were sent out pursuant to I.C. § 34-1002 and UOCAVA because "Idaho Code Title 34, not Title 50, applies to the conduct of this [City of Coeur d'Alene's] election.[82]

Chief Deputy Hurst testified that, regardless of whether or not a person is considered a resident for state, county, or national elections, the person is not qualified to vote in a municipal election unless he meets the requirements of a resident under I.C. § 50-402.[83]

Assertion 8: Criminal Intent.
Criminal intent is required for malconduct, fraud, and corruption. K. br. p. 26.

Response:

Even Kennedy's cited definition of, malconduct, recognizes that it is "bad conduct." No criminal intent is required.

Fraud may be either actual or constructive. *Id*. at 294. Counsel for Claimant has not located any Idaho Supreme Court decision limiting the applicable fraud. Constructive fraud exists when there has been a breach of a duty arising from a relationship of trust and confidence, as in a fiduciary duty.[84] In *Gray v. Tri-Way Const. Services, Inc., 147 Idaho 378, 210 P. 3d 63,*

[79] Tr. p. 121, l. 14-15.
[80] Tr. p. 149-150.
[81] Tr. p. 156, l. 5-18.
[82] Tr. p. 615, l. 1-9; Plf. Exhibit 102.
[83] Tr. p. 456, l. 4-8.
[84] Certainly the election duties of City Clerk Weathers and as abrogated to Kootenai County were a relationship of trust and confidence to the city electors and constitutes a fiduciary duty. The failure to comply with literally all laws enacted regarding absentee ballots, the failure to address the fact that 9 more absentee ballots were counted than

71 (2009) this Court instructed that "the gist of a constructive fraud finding is to avoid the need to prove intent (i.e., knowledge of falsity or intent to induce reliance) [under the elements required to prove actual fraud], since it is inferred directly from the relationship and the breach.

Under constructive fraud, once it is proven that there has been a breach of duty arising from a relationship of trust and confidence, the Claimant is not required to prove (1) the speaker's knowledge of the falsity regarding the statement or representation of fact, or (2) the speaker's intent that the hearer rely on the statement or representation of fact, to sustain a claim of constructive fraud. There is no requirement of criminal intent for constructive fraud.

Response to Respondent City/Weather's Brief:

Assertion 9: Contract.
If the City cannot contractually abrogate all of its and the clerk's election duties nearly every municipal election for the past several decades would be void.
C/W br. p. 8.

Response:

This is an incorrect assertion. There is a difference between 'void' and 'voidable.' In order for an election to be 'voidable' it would require a timely election contest. Obviously that did not occur in those other elections which may, or may not, have been conducted properly under Idaho's Municipal Election laws. The assertion that "nearly" every municipal elections would be void recognizes that municipalities in Idaho in fact do follow chapter 4, title 50, Idaho Code.[85]

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were returned and not rejected (Voided), McHugh's refusal to investigate further and leave Spencer to a remedy of an election contest, the meeting scheduled the day after the contest was filed and held the next day by attorneys for the City, County and Kennedy to arrive at a plan to thwart the contest when it was known that 9 more absentee ballots had been counted than should have been, the repeated affidavits of English and Beard that there was not a problem with the absentee ballot, and the "cleaning" of Beard's computer at least four months after the contest was filed of all of her information, arise to a breach of fiduciary duty.

[85] While it is not in evidence it certainly does appear, from Pete McDougall's testimony before the legislature, that the City of Pocatello understands and complies with Idaho's Municipal Laws.

Assertion 10: Obstruction:
There is no basis for the allegation that Kennedy's attorney obstructed or interfered with non-party witnesses. C/W br. p. 11.

Response:

The affidavit of Appellant Brannon's counsel contained in the Clerk's Record at pages 1556 through 1567 reveal that this assertion is false. The affidavit of Kennedy's counsel, contained in the Clerk's Record at pages 1693 through 1696, confirms the occurrence of the conduct complained of.

Assertion 11. County Bond Election:
The entire election should not be set aside because this contest has nothing to do with the County bond issues on the ballot. C/W br. p. 17.

Response:

This election contest does not have anything to do with, nor does it seek to set aside the 2009 Kootenai County Election that contained a bond issue and a tax issue. The residency requirements for electors in municipal elections are different than the residency requirements for electors in county elections. No challenge was, or has been, made to Kootenai County's election. This Court's decision will have no impact on the County's bond election.

Assertion 12: Clerk:
Appellant Brannon suggests the City Clerk committed error in canvassing the votes. There is overwhelming evidence that the City properly canvassed the results of the election. C/W br. p. 20.

Response:

There is no assertion in Appellant Brannon's Opening Brief that it was the duty of the Clerk to canvass the votes, or that she committed an error in doing so. She is the city clerk, not the city council acting as the board of canvassers. The Opening Brief properly states only that the mayor and council failed to perform any count of votes. Literally no canvass occurred. Indeed City Clerk Weathers does not dispute or try to explain away that it is the City's and her

belief that a "canvass" is a mere formality; a "rubber stamp" of the tabulation of votes presented to by the county. Weathers testified:

"That's what a canvass of votes is, is accepting the tabulations of an election."[86]

The facts establish that the "canvass" consisted of printing the counting machine report, placing those numbers into the document entitled "District Canvass," copying the number totals for each City election race onto Beard's letter dated November 9, 2009, and the City Council "accepting the tabulations."[87]

Assertion 13: Database.
The Secretary of State' statewide database is unreliable.

Response:

The district court found that Plaintiff's Exhibit 5, the November 6, 2009 absentee ballot record produced as a public record, is the only useful record.[88] However the district court then held that relying on the November 6, 2009 absentee ballot record is not justified.[89] This finding is not supported by any evidence. There is no evidence that there was any error in the entries being put into the system. Beard testified that each returned absentee ballot envelope with enclosed ballot was input into the database on a daily basis.[90] Chief Deputy Hurst testified that if daily reports were kept they should add up to the figures on Plaintiff's Exhibit 5.[91] Chief Deputy Hurst also testified that the best evidence and the only evidence that is available documenting the total number of absentee ballots that were received on or before 8:00 p.m. on November 3, 2009, is Plaintiff's Exhibit 5.[92] [93] He testified that without there being a different statewide database

[86] Tr. p. 99, l. 21-22.
[87] Tr. p. 695, 696, Tr. p. 99, l. 21-22.
[88] R. p. 2289.
[89] R. p. 2290.
[90] Tr. p. Tr. p. 624, l. 15-25.
[91] Tr. p. 465, l. 7-11.
[92] Tr. p. 462, l. 4-20.

report available showing otherwise, there is no way that anyone could verify that more than 2047 absentee ballots were validly received.[94] He testified that the statewide data base is "used to validate the number of absentee ballots that are tabulated match the number of ballots that were received."[95]

There was testimony that while voters could be removed from the database for the 2009 election, no voters could be added to the database after the election.[96] Susan Smith testified, consistent with her affidavit which is Plaintiff's Exhibit 25, that after searching the database from November 1, 2009 through November 30, 2009 that none of the persons whose names were purged from the database were persons who voted in the 2009 City of Coeur d'Alene General Election.[97]

There is no evidence that supports the district court's determination that the November 6, 2009 absentee ballot record, Plaintiff's Exhibit 5 is not reliable. It is the only evidence of the total number of absentee ballots that were received for the election and it is the only evidence of the total number of absentee ballots for the City's election that should have been counted.

Assertion 14: Attorney fees and costs.

Response:

Respondents City and Weathers seek costs under I.C. § 34-2036 and IAR Rule 40. Should they prevail in this appeal, an award of costs under this statute and this rule would be appropriate, as a matter of course, under IAR Rule 40. They also seek costs under IRCP Rule 11 but that claim is without merit.

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[93] Tr. p. 442, l. 12-23.
[94] Tr. p. 435, l. 5-18.
[95] Tr. p. 434, l. 7-10.
[96] Tr. p. 465, l. 2-4.
[97] Tr. p. 339, l. 1-24.

Respondent Kennedy does not specifically seek an award of costs on appeal. Nonetheless should he prevail in this appeal he would be entitled to an award of costs under IAR Rule 40.

Respondents City and Weathers seek an award of attorney fees on this appeal under I.C. § 12-120. This section does not provide a basis for an award of attorney fees in this appeal.

Respondent City and Weathers also seek an award of attorney fees on this appeal under IAR Rule 41. Respondent Kennedy seeks an award of attorney fees on this appeal under Idaho Code § 12-121.

Idaho Code § 12-121 authorizes this Court to award reasonable attorney fees to the prevailing party on appeal, not as a matter of right, but only where the Court is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably, or without foundation.[98] Any assertion that this appeal was brought, pursued or defended frivolously, unreasonably, or without foundation is without merit. In any deliberations of this matter the Court is asked to consider the statewide significance of the issues raised on this appeal and the extraordinary effort that was necessary to compile and present these issues with proper citation to the record, statutes, and case law to this Court.

CONCLUSION

Since the filing of this election contest it has been stated,

> The issue is the election and its validity. The most important concern in this matter should be the interest of the voters of the City of Coeur d'Alene in a fair and accurate process and ballot count. The voters of Coeur d'Alene are the true clients of all the attorneys involved in this election contest. The interests of our respective clients should be the same as the voters' interests.[99]

[98] *See Minich v. Gem State Developers, Inc., 99 Idaho 911, 918, 591 P. 2d 1078, 1085 (1979) and Noble v. Ada County Elections Bd., 135 Idaho 495, 504-505, 20 P. 3d 679 (Idaho 2000).*
[99] R. p. 302.

Nothing has changed in this regard. The real parties in interest, those persons with the greatest interest, in this appeal are the legal electors of the City of Coeur d'Alene. This appeal does not seek, nor will the reversal and remanding for a new election, disenfranchise any legal elector of the City of Coeur d'Alene. To the contrary, permitting the election results to stand, even though more absentee ballots were counted than received and in permitting non-resident Canadian and California voters to have their votes counted is what will disenfranchise the legal electors of Coeur d'Alene. With a new election every one of Coeur d'Alene's legal electors will have the opportunity to vote.

No decision as to the validity of any election should be based upon a 'do over' cost analysis. If that is, or is perceived to be, the test then the cost to our election process, and the elector's ability to believe that elections results are valid, will be forever lost. The loss of the faith that the electorate must place in persons conducting any election would cause long lasting distrust by the electorate and probably heighten the perception held by many citizens already, that their vote doesn't matter.

Electors are reasonable and understanding people. When their legitimate concerns are acknowledged and addressed in an open and reasonable fashion, while some of them may disagree with how a respective issue is resolved, they will be able to observe, and able to acknowledge that the issue was addressed and move on. What electors cannot do, and should not be required to do, is accept being confronted with a closed door to their legitimate concerns and the issuance of an ultimatum to go away or file an election contest.

The district court's finding that the absentee ballot return envelopes constitute the absentee ballot record contemplated, is not supported by any competent evidence. The district court's finding that 2051 absentee ballot envelopes were returned and each contained one valid

absentee ballot to be counted, is not supported by any competent evidence. There is no competent evidence that supports the district court's finding that a total of 2051 legal absentee ballots were returned in the total of 2051 envelopes that it found were returned.

This case is unlike *Noble*[100] because *Noble* was a 'primary' election in which discovery was extremely limited,[101] trial held and decision made, and an appeal decided in time for the general election printing of ballots and sending out of absentee ballots. This case, despite the extensive efforts of Respondents to rush it to trial as early as January 2010, removed any public presumption that it was conducted accurately to the extent humanly possible. Certainly mistakes can be, and are, made in the conduct of elections. It is generally presumed that the persons conducting an election do the best job they can. However, these presumptions are swept aside when persons conducting the election disregard the election laws and disregard all of the well planned and conceived legislative checks to the accuracy of an election. Such unacceptable conduct erases any presumption that this election results were accurate to any degree of humanly reasonableness. When the only, and best, evidence establishes that 9 more absentee ballots were counted than were received, in an election decided by 3 votes, there must be a new election.

This Court should reverse this matter and remand it to the district court for the entry of an order requiring a new election.

Respectfully submitted this 28th day of December, 2011.

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Starr Kelso, Attorney for Appellant Brannon

[100] *Noble v. Ada County Elections Board, 135 Idaho 495, 20 P. 3rd 679 (2001).*

[101] Although to Ada County's credit it didn't fight and argue against providing any access to election documents like the City and Kootenai County did in this case.

CERTIFICATE OF SERVICE: I certify that two bound copies, and one CD in compliance with I.A.R. 34.1, of Appellant Brannon's Reply Brief was served on:

Respondent Kennedy's attorneys:

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On the 28th day of December, 2011, by sending the same in an envelope by the United States Mail, postage prepaid thereon.

_____
Starr Kelso