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Brannon v. City of Coeur d'Alene Respondent's Brief 2 Dckt. 38417

IN THE SUPREME COURT OF THE STATE OF IDAHO

JIM BRANNON,

Plaintiff-APPELLANT,

vs.

CITY OF COEUR D' ALENE, IDAHO, ET AL.,

Defendants/RESPONDENTS.

SUPREME COURT NO. 38417-2011

Kootenai County Case
No.: CV-09-10010

BRIEF OF RESPONDENT CITY OF COEUR D' ALENE AND SUSAN WEATHERS

Honorable Charles W. Hosack, Presiding

Appeal from the District Court of the First Judicial
District for Kootenai County

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II. STATEMENT OF THE CASE

A. Nature of the Case

The Respondents City of Coeur d' Alene and Susan Weathers, in her official capacity, (hereinafter, "City"), concur with the Respondent Kennedy and Appellant Brannon's statements regarding the nature of the case.

B. Course of the Proceedings

The City concurs with the Respondent Kennedy's statements regarding the course of the proceedings. In addition:

1. December 16, 2009, the City answered Appellant's Amended Complaint and filed Motion to Dismiss. R., Vol. I, p. 116 and 131.
2. February 22, 2010, Appellant filed Memorandum in Opposition to City's Motion to Dismiss. R., Vol. I, p. 543.
3. March 1, 2010, Respondent Kennedy filed Time Line of Events in regard to City's Motion to Dismiss. R., Vol. I, p. 760.
4. March 8, 2010 through March 30. 2010, Appellant filed Motions, Memorandums and Supplemental Memorandums regarding reconsideration, permissive appeal, disqualification, and bond reduction.
5. March 10, 2010, City filed Memorandums in Opposition to Appellant's Motions.
6. May 25, 2010, Appellants filed Motions for Permissive Appeal, Motion for Reconsideration of Dismissal of Malconduct cause and supporting memorandums. R., Vol. I, pp. 1182-1195.

7. June 8, 2010, City filed Memorandums in Opposition to Plaintiffs' Motions, including Memorandum in Opposition to McCrory's Motion to Intervene. R., Vol. I, p. 1257 and 1274.

8. November 15, 2010, Appellants filed Notice of Appeal. R., Vol. I, p. 2371.

9. January 4, 2011, Order denying Appellant's Post-Trial Motions for New Trial, JNOV or alternatively to Amend. R., Vol. I, p. 2668.

10. February 1, 2011, Appellants filed Amended Notice of Appeal. R., Vol. I, p. 2671.

C. Statement of Facts

The City concurs with the Respondent Kennedy's statements regarding the course of the proceedings. In addition:

1. On August 18, 2009, the City Council for the City of Coeur d' Alene entered into an Agreement with Kootenai County whereby the Clerk of the District Court of Kootenai County would conduct the general municipal election for the City of Coeur d' Alene on November 3, 2009, under the supervision of the City Clerk for the City of Coeur d' Alene. *See* R., Vol. I, pp. 77, and 499-504; and, *see* Defendant/Respondent City's Trial Exhibits A and B. Said agreement was authorized pursuant to Idaho Code §§ 67-2332, 67-2326, et. seq., and 34-1401. The trial court concluded that the subject contract was legal and valid.

2. On November 3, 2009, Kootenai County supervised and conducted the County Bond election as well as general elections for various municipalities, including the general election for the City of Coeur d' Alene, which included election for Council Seat No. 2 for the City of Coeur d' Alene. *See, e.g.*, R., Vol. I, p. 76.

3. On November 9, 2009, the Elections Manager for the Office of Kootenai County Elections, under the supervision of Dan English, Clerk of the District Court of Kootenai County, prepared a report of the election results and presented the same to the City for the final canvass of votes for the November 3, 2009, general election for the City of Coeur d' Alene. This final election results was presented to the City Clerk for the City of Coeur d' Alene. *See, e.g.,* R., Vol. I, p. 79.

4. On November 9, 2009, the Mayor and Council for the City of Coeur d' Alene met per Idaho Code § 50-467 for the purpose of canvassing the results of the City of Coeur d' Alene general election. The City Council voted to accept the canvass of votes and authorized the City Clerk, Susan Weathers, to sign any and all necessary documents formalizing the election results as set forth in the canvass. *See* Plaintiff/Appellant's Exhibits 86-87.

5. The statutory deadline for a candidate desiring a recount expired twenty days following the November 9, 2009, canvass of the City of Coeur d' Alene general election. *See* Idaho Code § 50-471. The Appellant did not apply to the attorney general for a recount.

6. On November 30, 2009, the Appellant filed his Complaint in this matter claiming:

   a. That under Idaho Code § 50, Chapter 4, said municipal Defendants, among others, erred in the administration of the City of Coeur d' Alene general election by entering into an Agreement with Kootenai County to administer said election and conduct a canvass of the vote;

   b. That under Idaho Code § 50, Chapter 4, said Defendants, among others, "failed to require that absent electors furnish timely and appropriate requests for absentee ballots" and used "outdated and inappropriate request forms for absentee ballots";

c. That under Idaho Code § 50, Chapter 4, said Defendants, among others, failed to verify all applications for absentee ballots to determine whether said application was "registered and lawfully entitled to vote";

d. That under Idaho Code § 50, Chapter 4, said Defendants, among others, failed to administer absentee ballots as prescribed by the Idaho Legislature;

e. That under Idaho Code § 50, Chapter 4, said Defendants, among others, failed to maintain a "poll book" for various precincts including Absentee Precinct 0073;

f. That under Idaho Code § 50, Chapter 4, said Defendants, among others, counted "at least two (2) more absentee ballots in the final vote tally than were actually documented";

g. That under Idaho Code § 50, Chapter 4, said Defendants, among others, failed to maintain "poll books" for the "consolidated City of Coeur d' Alene and Kootenai County precincts";

h. That under Idaho Code § 50, Chapter 4, said Defendants, among others, "failed to prevent the receipt of illegal votes cast and counted in a number and amount in excess of five (5) ..."; and,

I. That under Idaho Code § 50, Chapter 4, said Defendants, among others, allowed one person who resided in the County, but not in the City, to vote in the City of Coeur d' Alene general election. *See* R., Vol. I, p. 1.

7. On or about December 10, 2009, the Appellant filed his Amended Complaint basically asserting the same causes but eliminating claims against the County. See R., Vol. I, p. 75.

8. On January 5, 2010, the City of Coeur d' Alene installed those candidates who were declared elected by the City Council for the City of Coeur d' Alene. *See* R., Vol. I, p. 227-228.

9. On March 3, 2010, the trial court dismissed all claims levied by the Appellant against the City, and in doing so declared that the City's contract with the County of Kootenai to oversee, supervise and conduct the City of Coeur d' Alene's General Election was valid and legal. *See* R., Vol. I, p. 793.

10. On May 25, 2010, the trial court Ordered that the City and its Clerk shall be proper parties to the subject lawsuit for purposes of carrying out and executing any and all orders issued by the Court relating to the Appellant's claims. No other claims levied by the Appellant against the City were reinstated save for whether the City erred in the canvass per Idaho Code § 34-2001(6). Further, the trial court reaffirmed the validity of the subject contract and declared that the County oversaw, supervised and conducted the subject election. *See* R., Vol. I, p. 1203-1205.

11. Indeed, the issues to be tried would be whether illegal votes were case for Seat No. 2 (Kennedy v. Brannon), whether the number of illegal votes was 5 or more, and if so whether said votes would change the outcome of the election; and, whether an error occurred in declaring the result. That is it. The trial court dismissed any issues regarding "liability" or vicarious "liability;" any issues regarding fraud or malconduct; and, any issues regarding the propriety of the City of Coeur d' Alene's contract with Kootenai County. Of course, following a six day trial the trial court found and concluded that Kennedy prevailed in the election.

Moreover, at trial:

A. There was no evidence that the City of Coeur d' Alene, or any of its employees, violated any provisions of Title 50, Chapter 4, or Title 34 in relation to

the 2009 City of Coeur d' Alene General Election. And, moreover, as noted the subject contract between the City of Coeur d' Alene and the County of Kootenai regarding said County's supervision and conduct of the subject election was valid and legal. Id., and *see* R., Vol. I, p. 2297.

B. There was no evidence that Kootenai County, a non-party, or any of its employees, violated any provisions of Title 50, Chapter 4, or Title 34 in relation to the 2009 City of Coeur d' Alene General Election such that the outcome of the election would have changed. *See* R., Vol. I, p. 2297.

C. There was no evidence that the County knowingly received any illegal votes; and, there was no evidence of any error committed during the City's canvass or in declaring the result of the election. *See* R., Vol. I, pp. 2296-2297.

D. There was insufficient evidence of illegal votes cast that would alter or change the result of the subject election for Seat 2 for the City of Coeur d' Alene. *See* R., Vol. I, p. 2297.

E. There was insufficient testimony from some of the alleged illegal voters regarding which candidate said witnesses voted for in regard to Seat 2 in the 2009 City of Coeur d' Alene General Election, as required under I.C. § 34-2017. *See* R., Vol. I, pp. 2280-81.

F. The Defendant Mike Kennedy was lawfully elected and installed to Seat 2 for the City Council for the City of Coeur d' Alene in the 2009 General Election for the City of Coeur d' Alene. *See* R., Vol. I, p. 2297.

III. ISSUES ON APPEAL

The City concurs with the Respondent Kennedy's statement pertaining to the Issues on Appeal. In addition:

A. I - IV of Respondent Kennedy, concur.

B. Did the Trial Court Err in Denying Appellant's Motion to Disqualify?

C. Did the Trial Court Err in Dismissing the Appellant's Claims of Fraud and Malconduct during the Conduct of the Subject Election?

D. Did the Trial Court Err in certain decisions made during the course of the trial?

1. Application of UOCAVA.

2. Finding of 2051 Absentee Ballots.

3. Seat No. 2 v. Entire Municipal Election.

E. Did the Trial Court Err regarding the burden of proof?

F. Propriety of City's Canvass.

G. Did the Trial Court Err in Denying the Appellant's Motion for New Trial or alternatively to Amend the Judgment?

H. City is Entitled to Fees and Costs on Appeal.

IV. ARGUMENT

Standard of Review

The City concurs with the applicable standard of review set forth by the Respondent Kennedy for reviewing the trial court's October 5, 2010, Memorandum Decision and the subsequent Judgment. The City also concurs with the standard set forth by this Court in *Noble v. Ada County Elections Board*, 135 Idaho 495, 20 P.3d 679 (2000).

A. Respondent Kennedy's Issues on Appeal.

Initially, as noted the City concurs with the issues on appeal set forth by Respondent Kennedy, and the arguments posited therein. In addition, the City comments as follows on the issue pertaining to the validity of the contract between the City and Kootenai County, and on the issue of whether the trial court could compel an out of state witness to travel to Idaho to testify at trial.

With regard to the validity of the contract between the City and Kootenai County for the County to administer and supervise the November 3, 2009, General Election, the Appellant contends that the trial court erred in finding that the City was legally authorized to enter into such a contract. That is, it is ultra virus. The Appellant's claim is without legal merit. Idaho Code §§ 67-2326, et. seq., and 67-2332 allow municipalities to contract with their respective counties to conduct municipal elections. Moreover, Idaho Code § 34-1401 authorizes a political subdivision to contract with a county clerk to oversee and conduct an election. Indeed, that provision provides, in part:

> A political subdivision may contract with the county clerk to conduct all or part of the elections for that political subdivision. In the event of such a contract, **the county clerk shall perform all necessary duties of the election official of a political subdivision** including, but not limited to, notice of the filing deadline, notice of the election, and preparation of the election calendar.

(Emphasis added.) In sum, the City of Coeur d' Alene was statutorily authorized to delegate oversight, supervision, etc., of the November 3, 2009, City of Coeur d' Alene general election to the Clerk for Kootenai County. If this were not permitted by the Idaho Legislature, nearly every municipal election in the state of Idaho for the past several years, if not decades, would be void.

With that, the Appellant contends that Idaho Code § 34-1401 exempts municipalities from the provisions therein. However, the Appellant misreads Idaho Code § 34-1401. It clearly provides, "NOTWITHSTANDING ANY PROVISION TO THE CONTRARY, the election official of each political subdivision shall administer its elections ... ." (Emphasis added.) There is a "provision to

the contrary," and it is found in the second full paragraph of I.C. § 34-1401, which specifically and unequivocally provides that "a political subdivision may contract with the county" to conduct the election, and once that contract occurs the "county clerk SHALL perform all necessary duties ... ." (Emphasis added.)[1] This, and other provisions, namely Idaho Code § 67-2332, clearly provide that municipalities may contract with counties to conduct elections. And, Title 34, Chapter 2 provides the respective county clerk full supervisory authority over elections that said clerk is conducting.

Finally, on this point, the legislative purpose and intent underlying Idaho Code § 34-1401 clearly shows that the Idaho Legislature intended for a municipality to contract with its respective county in conducting the election. This makes sense because, as noted, cities throughout Idaho have been doing it for years. In sum, it is apparent that the Idaho Legislature did intend for municipalities to delegate the supervision of elections. *See* Respondent Kennedy's Brief at pages 11-12. *See also* R., Vol. I, p. 495-497 and 505-511.

It should be noted that the trial court dismissed all causes of action against the City on the basis that the City of Coeur d' Alene lawfully, and with authority, contracted and delegated the conduct of the November 3, 2009, General Election, to Kootenai County; and, therefore, the County assumed supervisory responsibility over the conduct of said election. As such, since all other claims

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[1]The Appellant continues to argue that municipalities are exempt from I,C. 34-1401, but in doing so he fails to appreciate that the word "exempt" is not saying that municipalities may not contract with counties to conduct elections. It simply means that municipal elections are exempt from the constrictions, rules, procedures, etc., set forth in Title 34, Chapter 14, unless otherwise provided, regardless of who conducts the election. In other words, regardless of whether the city clerk or county clerk conduct and supervise a municipal election, the conduct of said municipal election is not governed by Title 34, Chapter 14, unless otherwise provided. Once again, the statute and provisions therein do not say that a city cannot contract with a county to conduct the election. To the contrary. The statute specifically provides a municipality the authority to contract with a county, as discussed.

pled against the City pertained to said City's conduct of the subject election, and since the County assumed responsibility for the conduct of said election, then said causes are without merit. In other words, the Appellant pled claims pertaining to the conduct of the election against the wrong party.

Moving on to the issue of whether the Court erred in denying the Appellant's request that five out-of-state absentee voters (four of which out of the United States) be ordered to appear at trial, the the Appellant contends that Idaho Code § 34-2013 and § 34-2017 authorized the trial court to compel an out-of-state witness to appear at trial. However, the Appellant failed to consider Idaho Code § 31-2014. The provisions referred to by the Appellant, when read with I.C. § 31-2014, provide that the Court has the authority to compel the attendance of witnesses who are subject to subpoena per the Idaho Rules of Civil Procedure.

In that respect, Rule 45(g), IRCP, specifically provides that subpoena power exists intrastate as opposed to beyond the jurisdiction of the Court. *See State v. Baird*, 13 Idaho 126, 89 P.298, 301 (1907) (in dicta, the Court noted that an out of state witness is not subject to subpoena power of the court). *See also*, AM JUR WITN § 15:

> Generally, a state has no power to subpoena witnesses over which it has no jurisdiction. Thus, the constitutional right of compulsory process, which includes the subpoena of witnesses, is applicable to the states but extends only to in-state process. In the absence of an interstate compact, compulsory process cannot extend beyond the territory of the state, and a state court cannot require the attendance of a witness who is a nonresident of, and is absent from, the state.

Id. (citations omitted). In sum, if the trial court does not have jurisdiction to enforce a subpoena, then it may not compel the attendance of the witnesses. It should be noted that Rule 45(I), IRCP, sets forth the process in issuing subpoenas to non-residents. In other words, the Appellant had avenues available to obtain the information he desired but chose not to employ.

Also, the Appellant continues to allege that counsel for Respondent Kennedy somehow obstructed or interfered with the non-party witnesses such that they refused to testify at trial or were somehow uncooperative. This, of course, presumes that said non-party witnesses were previously willing to testify and/or were cooperative with Appellant's counsel. In any event, there is no basis for such an allegation as set forth in the Appellant's briefing.

B. Did the Trial Court Err in Denying Appellant's Motion to Disqualify?

The Appellant contends that the trial court erred in denying his Motion to Disqualify Judge Hosack, filed on the morning of the first day of trial. In doing so, the Appellant contends that Judge Hosack was biased based on a statement made on the record by Judge Hosack in an ancillary matter pertaining to whether a non-party, William McCrory, violated a confidentiality agreement with regard to the recount conducted by independent observer Judge Eugene Marano. Tr., p. 9-31.

As the Court knows, Rule 40(d)(2), IRCP, provides that a party may seek the disqualification of a presiding judge upon showing of interest, relation to parties, prior representation and/or bias or prejudice. It has been held that "[i]n order for a judge to be disqualified under this rule, the alleged bias or prejudice 'must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *Hayes v. Craven*, 131 Idaho 761, 963 P.2d 1198 (Ct. Ap. 1998) (citation omitted). Moreover, the decision to grant or deny a motion to disqualify is left to the sound discretion of the presiding judge. *Pizzuo v. State,* 127 Idaho 469, 470, 903 P.2d 58, 59 (1995).

Here, the Appellant's last minute claims of bias and prejudice are unsupported in the record, and, as noted, are based solely on a vague comment made by the trial court in another, unrelated matter involving a non-party witness that was assisting the Appellant at the trial of the instant matter.

In fact, the comment referred to at page 12 in the trial transcript was taken out of context by the Appellant and hence was not extrajudicial, as contemplated in the Rule, let alone indicative of bias or prejudice. *See* Tr., pp. 25-31. And, even if the comments were somehow adverse, adverse statements or rulings, especially in an unrelated matter, do not support the basis for disqualification. *See Bell v. Bell,* 122, Idaho 520, 530, 835 P.2d 1331, 1341 (Ct. App. 1992). There must be something more, such as a direct showing of bias, prejudice, involvement, etc. The Appellant failed to make such a showing and as such the trail court did not err in denying the Appellant's trivial and baseless claim.

C. Did the Trial Court Err in Dismissing the Appellant's Claims of Fraud and Malconduct during the Conduct of the Subject Election?

The Appellant claims that the trial court erred with regard to its repeated dismissals of the Appellant's claims of malconduct and fraud. This was addressed by Respondent Kennedy, as well, and the City concurs with Respondent Kennedy's position. In addition, the City notes the following.

The Appellant alleges that the trial court erred in dismissing his claims under Idaho Code § 34-2001(1), i.e., fraud, corruption or malconduct, on the sole basis that because it was pled then it should have been considered at trial. However, to the extent that the Appellant did plead claims of fraud and malconduct, there was no evidence whatsoever to support such claims. Hence, the trial court was justified in denying the Appellants' baseless claims. *See* R., Vol. I, p. 793-794.

Indeed, at no time did the Appellant ever present evidence whatsoever to show or even infer that any individual voted under the auspices of corruption, fraud or malconduct; nor did he allege that the County fraudulently allowed the votes of any individuals. More importantly, there is no evidence in the record before this Court of any fraud, corruption or malconduct by any entity or

individual. *See* R., Vol. I, p. 2293-2297. Rather, the Appellant merely asserted and asserts that some votes were illegally cast.

As such, the trial court in the instant matter appropriately recognized that it must consider the factual support of any claim set forth in the pleadings to determine its plausibility. *See, e.g., Hellickson v. Jenkins*, 118 Idaho 273, 796 P.2d 150 (Ct. App. 1990). That is, the trial court must look beyond whether a claim for relief has been pled, but whether said claim is plausible under the facts pled in support of said claim.[2]

Indeed, recently the federal courts, including the United States Supreme Court, reinforced the principle that the trial court must act as a gatekeeper to prevent unsupported and baseless claims from proceeding. In *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007), the United States Supreme Court upheld a 12(b)(6) Motion to Dismiss generally stating that allegations in a complaint must be facially plausible. In other words, a plaintiff must plead facts from which reasonable inference can be drawn that the defendant is liable. *Id.* at 556. In particular, the *Twombly* Court stated that plaintiffs must allege more than hope, but rather sufficient facts to raise the claim beyond mere possibility and into the realm of plausibility. *Id.* at 555. *See also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), where the United States Supreme Court upheld *Twombly*, stating:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.*, at 570. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556. The plausibility standard is not akin to a "probability requirement"" but it asks for *more than a sheer possibility that a defendant has acted unlawfully. Ibid.* Where a complaint pleads facts that are "merely consistent with" a

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[2]If not, then what is the purpose of Rule 11(a)(1)? That provides that claims must be grounded in fact.

> defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*, at 557 (brackets omitted).

Iqbal, *supra* at 1949 (emphasis added) (quoting *Twombly*, 550 U.S. 544). In sum, a pleading that "tenders naked assertion[s] devoid of further factual enhancement'" is insufficient to overcome a Rule 12(b)(6) motion. *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 555, 557)).

As this pertains to the instant matter, the Appellant never pled or asserted any facts that would have shown or even suggested that that someone, whether it be the County, the City Clerk, or even a voter, engaged in fraud, corruption or malconduct, as provided for in Idaho Code § 34-2001(1).[3] There was and is no factual support for such a claim, and merely alleging that something seems askew is insufficient to support a claim arising under I.C. § 34-2001(1).[4]

Therefore, the trial court did not err in dismissing or not allowing the vague claim of fraud and malconduct. *See* R., Vol. I, p. 2293-2297. Indeed, even after the evidence had been submitted at trial, the trial court was in the position to ascertain whether such a claim was factually plausible and still did not accept the same because the Appellant failed to present one iota of fact that would suggest fraud.

D. Did the Trial Court Err in certain decisions made during the course of the trial?

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[3]Of note, the claim of fraud/malconduct lies against a non-party, and not the Respondents Kennedy or the City of Coeur d' Alene and its Clerk. Perhaps the Appellant should not have dismissed Kootenai County in December, 2009. Of course, had he not dismissed the County, surely the County would have filed summary judgment on the basis that there is a complete absence of any wrongdoing, fraud or otherwise.

[4]As the Court knows, I.C. § 34-2001(1) provides that the contestant must show evidence which is tantamount to fraud as opposed to evidence that the election was not conducted in a precise manner. Indeed, "A showing that election officials failed to follow every election procedure precisely, without more, [i.e., evidence of malconduct], is insufficient ... ." *See Noble v. Ada County Elections Board*, 135 Idaho 495, 504, 20 P.3d 679, 688 (2000). Here, the Appellant's claims, as well as the facts, as pled, simply show, at best, that the subject election may not have been conducted in a precise manner.

1. Application of UOCAVA.

The Appellant seemingly suggests that the trial court's application of the Uniformed and Overseas Citizens Absentee Voting Act 42 USC § 1973, et. seq., (UOCAVA) was improper. This was addressed by Respondent Kennedy at pages 23-24 of his Brief. In addition, the City adds that the trial court did not err, and in fact considered and applied the applicable law to this case with regard to qualified electors. Namely, Idaho Code § 50-402(c) and (d). And, of course, the trial court considered and applied UOCAVA because it was adopted by the State of Idaho under Idaho Code § 34-1002. *See* Tr., p. 878. Therefore, the trial court did not commit error in applying UOCAVA. *See* R., Vol. I, pp. 2280-2284.

Setting the aforementioned aside, the crux of this case is whether there were illegal votes, and if so whether their votes would have changed the outcome of the election. After considering all the evidence, the testimony, the applicable and governing law, there was insufficient evidence of a sufficient number of alleged illegal voters to change the outcome. *See, e.g.*, R., Vol. I, p. 2280-2284. And, with regard to other alleged illegal voters, i.e., Dobsloff, Paquin, Friend, Farkes and Gagnon, they were deemed to have been qualified as a matter of law. R., Vol. I, p. 2284. There has been no showing that the trial court erred in law in making this determination. Thus, their votes were not illegal and they were therefore not compelled to testify about who they voted for.[5]

2. Finding of 2051 Absentee Ballots.

Here, the Appellant attempts to confuse and befuddle the issue of whether a sufficient number of illegal votes were cast that would have changed the outcome of the election by taking out of context the hand recount conducted by the independent observer, Judge Eugene Marano. This was

[5]Even if the trial court did err, there is no admissible evidence regarding their vote.

adequately addressed by the Respondent Kennedy in his Brief on Appeal visa via citing to the trial court's findings. *See* Respondent Kennedy's Brief at pp. 5-6; *see also* R., Vol. I, pp. 2285-2293. Indeed, the trial court concluded:

> The Court finds that the County did receive 2,051 absentee return envelopes with each envelope containing one valid ballot. Whether the missing return envelope was lost, or was mistakenly left out of the City stack and put in the County stack, is not in the record of this trial. Whether the missing return envelope is one of the four return envelopes that could not be determined as City or County but were all removed and subtracted by Judge Marano from the 2,086 counted in order to come to 2,082 is not known. Despite the absence of a Section 34-1011 record, the Court finds that County election officials performed well and in good faith. The Court finds that the most likely explanation for one missing return envelope is that it got lost through clerical error, and that the County did in fact count 2,051 valid absentee ballots sent in by 2,051 valid absentee voters.
>
> The fact that there is one missing absentee return envelope is simply insufficient for the Court to find an error in counting the vote.

Id. at 2292. Thus, the Appellant failed to present evidence showing an error in the hand recount conducted by Judge Marano.

In sum, the Appellant was only able to show that there may have been some irregularities in the conduct of the election due to inconsistencies between Judge Marano's recount and State of Idaho databases. However, said databases are not and were not accurate. Timothy Hurst, Chief Deputy, Secretary of State's Office, said that the database was not accurate nor was it intended to be used as an accurate assessment of votes cast because it is a "live database" that changes daily. Tr., p. 444-448. Rather, Hurst said that the most accurate method of determining the number of actual votes cast would be via a hand recount. *Id.* And, it is now well known that the hand recount conducted by Judge Marano matched the machine tally. Thus, there were not even any irregularities.

See R., Vol. I, pp. 2285-2293; and, *see* Appellant's Trial Exhibits 85, 86 and 97. *See also* R., Vol., I, pp. 2288-2293.

Before moving on, it should also be noted that the Appellant contends that the County failed to keep an Absentee Ballot Record as required under Idaho Code § 50-451, and because of this breach of duty there was no way of telling the true number of absentee ballots cast. It has been noted that "[a] showing that election officials failed to follow every election procedure precisely, without more, is insufficient under Idaho Code § 34-2101(1)." *Noble*, 135 Idaho at 504, 20 P.3d at 688. In other words, even if the County failed to maintain a ballot record, this does not establish that illegal votes were cast. Nonetheless, the hand recount by Judge Marano resolved any concerns regarding the number of absentee ballots cast, and that the machine tally was consistent with the actual number of absentee ballots cast. *See* R., Vol. I, p. 2293.

3. Seat No. 2 v. Entire Municipal Election.

Here, the Appellant seemingly suggests that the entire election should have been thrown out. With all due respect, this makes no sense. As counsel Scott Reed pointed out in Respondent Kennedy's Brief on Appeal at pages 14-20, never before has an entire election been tossed. And, there was no evidence to suggest that the instant election, in its entirety, should have been disregarded. Indeed, this case was whether there were illegal votes cast in the race for Seat No. 2 between the Appellant and Respondent Kennedy. This contest had nothing to do with anyone else running for election, or any of the County bond issues that were on the ballot.

E. Did the Trial Court Err regarding the Burden of Proof?

Incredibly the Appellant asserts the burden of proof shifted to the Respondents at trial because there was evidence establishing that the number of absentee ballots counted was inconsistent

with the number of legal absentee votes cast and thus there were a sufficient number of illegal votes cast to change the outcome of the election. This is, with all due respect, a complete stretch of logic. To say that alleged inconsistencies or irregularities in the number of votes cast equated to illegal votes that would have changed the outcome of the election, and hence shift the burden of proof, is is merely speculation.

In any event, the burden of proof never shifted because the Appellant failed to present sufficient evidence at trial to support his claims. In *Noble v. Ada County*, 135 Idaho 495, 20 P.3d 679 (2000), the Idaho Supreme Court essentially said that a contestant must establish that illegal votes were received and counted, as opposed to "could have been illegally cast." *Id.* at 501, 20 P.3d at 685. Indeed, the Court in *Noble* stated:

> The party contesting the election must initially prove that the number of illegal votes cast could have changed the result. *See Jaycox v. Varnum*, 39 Idaho 78, 92, 226 P. 285, 289 (1924) ("The rule that the party who is seeking affirmative relief has the burden of proof is one that necessarily underlies all our procedure.... [W]e conclude that the general rule as to burden of proof must apply to election contests."); *Huffaker*, 30 Idaho at 184-85, 163 P. at 794. Since Risch won by fifty-one votes, Noble had to show that at least fifty-one illegal votes had been counted. The district judge found that only the ten absentee ballots where the elector had failed to sign the affidavit were illegal, and should not have been counted.
>
> Noble introduced evidence at trial indicating that an undetermined number of unused ballots from prior elections were removed from a warehouse and used to make up for ballot shortfalls. After fifty of the ballots were used, the remaining ballots were returned to the warehouse. Noble claims that because there is no record of how many were taken from the warehouse and how many were returned, *some of these ballots could have been cast illegally*. The district judge found that Noble had presented no evidence that a single one of these ballots *had been improperly cast*.

Noble, 135 Idaho at 501, 20 P.3d at 685 (emphasis added). Thus, the contestant must show that there were a sufficient number of illegal votes cast as opposed to a sufficient number of illegal votes that could have or might have been cast. That is the contestant's burden. At that juncture, the contestant

then must establish that the illegal votes would have changed the outcome of the election. *See* Idaho Code § 34-2001.

In the instant matter, the Appellant failed to show that there were a sufficient number of illegal votes cast. Backing up, Respondent Kennedy prevailed in the General Election by 5 votes for Seat No. 2. At trial, the Appellant established that six illegal votes were cast. That was all that was proved by the evidence. Of the six illegal votes cast, one was for Appellant and three were for Respondent Kennedy. Two could not recall how they voted. Thus, Respondent Kennedy prevailed by three votes instead of five. Based on this, the Appellant had not established that there were a sufficient number of illegal votes cast, let alone cast for Respondent Kennedy that would change the outcome. Therefore, the Appellant did not prove the elements necessary to shift the burden of proof nor did he establish that the outcome would have been different. *See* R., Vol. 2279-2284.

The Appellant argues that there could have been more illegal votes. Indeed, the Appellant spent a significant portion of his brief suggesting that there were irregularities in the counting and tabulation of absentee votes. *See, e.g.*, Appellant's Brief at pp. 4-5, 39-45. *See* R., Vol. I, p. 2286. Even if that is true, the Appellant had the burden to establish a sufficient number of actual, illegal votes. He had the burden to establish what did occur versus what might have occurred. And, as noted, the Appellant then had the burden to establish that the illegal votes would have changed the outcome, as opposed to could have changed the outcome, of the election. The Appellant did neither and hence the trial court did not err in its findings and conclusions that were based on the evidence and the law. *See* R., Vol. I, pp. 2284, 2293,

F. Propriety of the Canvass.

The Appellant suggests that the City Clerk committed error in canvassing the votes. *See* Appellant's Brief at p. 34. The Appellant knows that there was overwhelming evidence that the City properly and pursuant to State law canvassed the results of the election. Moreover, there is no evidence whatsoever to suggest that the City and its Clerk did not canvass the results in a manner consistent with State law. *See* Tr., at pp. 255-257, 695-697 (County Officials' testimony regarding the legality of the canvass). In fact, the testimony of the County Officials' Dan English and Deedie Beard regarding the legality of the canvas was not disputed. In sum, there is no merit to the Appellant's claim that the canvass was illegal or in violation of I.C. § 34-2001(6). In sum, the trial court determined that there was no error and there has not been a showing to suggest otherwise. *See* R., Vol. I, p. 2286, 97.

G. Did the Trial Court Err in Denying the Appellant's Motion for New Trial or alternatively to Amend the Judgment?

The Appellant contends that the trial court erred in denying his Motion for New Trial, brought pursuant to Rule 59(a))(6) and (7), and that it failed to consider an "affidavit" that was filed by the Appellant in support of said Motion. As this Court knows, regardless of whether the Motion is brought under Rules 59(a)(6) or (7), the Appellant was required to show that the trial court's findings were against the clear weight of the evidence, or there was an error in law that occurred at trial; that the ends of justice would be served by vacating the decision; and, that a different result would follow on retrial. *See Carlson v. Stanger*, Idaho, 146 Idaho 642, 648, 200 P.3d 1191, 1197 (Ct. App. 2008); and, *Litchfield v. Nelson*, 122 Idaho 416, 422, 835 P.2d 651, 657 (Ct. App. 1992). For purposes of this response, the emphasis is on the word, "would." That is, the Appellant had to

show that the trial court's findings were so contrary to the evidence or that there was an error in law such that a different result **would** occur, as opposed to could occur.

The Appellant completely failed in this endeavor and did not establish that there was an error in law committed by the trial court; and, moreover, the Appellant failed to show that the trial court's findings were against the clear weight of the evidence such that a different result would occur on retrial. Indeed, the Appellant then and now set forth the same self-serving and unsupported argument that there was a discrepancy due to four envelops and that as such said discrepancy would have changed the result of the election.

Initially, the Appellant moved under Rule 59(a)(6) and (7), IRCP. These provisions do not allow the trial court to re-open the trial and consider new evidence. *See Lowe v. Lym*, 103 Idaho 259, 646 P.2d 1030 (Ct. App. 1982). Thus, to the extent the Appellant was attempting to offer new evidence, the trial court properly rejected the same. *See* Tr., Motion Hearing of December 7, 2010, at p. 78.

Moreover, the trial court already considered and weighed the evidence that the Appellant regurgitated in his Motion for New Trial. *See* R., Vol. I, pp. 2286-2293. And, the trial court considered again during the post-trial motions the evidence regarding the absentee ballots and Judge Marano's hand recount. And, again, determined that the trial court's findings and conclusions were supported. *Id.* at 88-93. Stating it another way, the Appellant failed to show that the trial court's findings and conclusions were against the clear weight of the evidence. Thus, the trial court did not err in denying the Appellant's Motion.

H. City is Entitled to Fees and Costs on Appeal.

The City seeks costs and fees for having to defend this appeal. First, the City seeks costs under I.C. § 34-2036, Rule 11, IRCP, and Rule 40, IAP. Moreover, the City seeks fees in having to defend this appeal pursuant to I.C. § 12-120 and Rule 41, IAP. Clearly, this case came down to one essential issue: whether there was evidence of sufficient illegal votes that would change the outcome of the election for Seat No. 2. After 6 days of trial, and numerous exhibits, the election was deemed lawful and the trial court confirmed that Respondent Kennedy prevailed.

Moreover, and perhaps more importantly for purposes of the City's request for attorney fees, at no time did the Appellant present any evidence whatsoever that the City did anything unlawful through the conduct of the election, i.e., the canvass. Yet, the Appellant filed this appeal forcing the City to continue to defend itself when there has been no showing, ever, that the City did anything in a manner that would be inconsistent with State election laws. Thus, this appeal against the City was pursued frivolously and without foundation. Therefore, the Court should grant the City's request for attorney fees on appeal. *See Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979).

CONCLUSION

The Court should affirm the District Court's October 4, 2010, Memorandum Decision and Order and November 2, 2010, Judgment in the instant matter because the Appellant has failed to demonstrate that the District Court based its Decision and the subsequent Judgment on an erroneous conclusion of law, or that it abused its discretion in applying the applicable law. Moreover, the Court should sustain the conclude that the District Court's Memorandum Decision and Order was sufficiently based in law and fact. The City also requests an award of costs and incurred in defending this Appeal.

DATED this 5 day of December, 2011.

HAMAN LAW OFFICE

By: _____
Michael L. Haman, Of the Firm
Attorneys for Respondent City of Coeur d' Alene/Susan Weathers in her official capacity

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5 day of December, 2011, I served a true and correct copy of the foregoing RESPONDENT CITY OF COEUR D' ALENE AND WEATHER'S BRIEF by the method described below to:

Starr Kelso P.O. Box 1312 Coeur d' Alene, Idaho 83816	✓ US Mail _____ Hand Delivered _____ Fax
Peter Erbland P.O. Box E Coeur d' Alene, Idaho 83816	✓ US Mail _____ Hand Delivered _____ Fax
Scott Reed P.O. Box A Coeur d' Alene, Idaho 83816	✓ US Mail _____ Hand Delivered _____ Fax

Michael L. Haman