IN THE SUPREME COURT OF THE STATE OF IDAHO

JIM BRANNON,	**)**	
Plaintiff-Appellant,	**)**	**DOCKET NO. 38417-2011**
vs.	**)**	
CITY OF COEUR D'ALENE, IDAHO,	**)**	
Defendant-Respondent.	**)**	
----------	**)**	

****

OPENING BRIEF OF APPELLANT BRANNON

****

Appeal from the District Court of the First Judicial District

****

The Honorable Charles W. Hosack, Presiding

Starr Kelso
Attorney at Law #2445
P.O. Box 1312
Coeur d'Alene, Idaho 83816
Attorney for Brannon

Michael L. Haman
Attorney at Law
P.O. Box 2155
Coeur d'Alene, Idaho 83816
Attorney for City

Peter C. Erbland
Attorney at Law
P.O. Box E
Coeur d'Alene, Idaho 83816
Scott W. Reed
Attorney at Law
P.O. Box A
Coeur d'Alene, Idaho 83816
Attorneys for Kennedy

TABLE OF CONTENTS

PAGE

CASES

IDAHO STATUTES

FEDERAL STATUTES

CONSTITUTIONAL PROVISIONS

RULES

STATE LEGISLATIVE BILLS

MISCELLANEOUS

ISSUES ON APPEAL

NATURE OF CASE

This is an appeal from an election contest affirming the election. The district court found a three (3) vote margin between Brannon and Kennedy for Seat 2.

COURSE OF PROCEEDINGS BELOW

The election contest was timely filed following the election. A six day bench trial commenced on September 13, 2010. Judgment was entered on November 4, 2010. Brannon's motion for a new trial or amended judgment was denied, and this appeal was timely filed.

STATEMENT OF FACTS

This election contest arose out of what the Chief Deputy Secretary of State labeled "a violation of the clerk's duty,"[1] failure to keep the mandatory absentee ballot record. Brannon and Kennedy were opposing candidates for Seat 2. The City delegated all election duties to Kootenai County (County). County employees conducted all aspects of the City's election. Neither the City, City Clerk, nor the mayor and council, performed their statutory duties. In conducting the election, the County failed to perform the City's statutory duties. The failures include: failing to prepare and maintain the required absentee ballot record,[2] failing to verify each absentee voter was lawfully entitled to vote,[3] sending out absentee ballots to non-residents of the City following federal law instead of state law, and failing to compare the number of legal absentee ballots documented received by absentee ballot record to the number counted by machine.[4] The machine count reflected that 2051 absentee ballots were counted on election night. Upon receiving a request to review the statutorily required absentee ballot record three days before the scheduled canvass, the County printed its first

[1] Tr. p. 444, l. 5-11.
[2] Idaho Code § 50-451.
[3] Idaho Code 50-445.
[4] Idaho Code § 50-464, Idaho Code § 50-465.

absentee ballot record. This record documented a total of 2047 absentee ballots were received, however five "Voided" ballots are included in that number.[5] The election clerk who prepared the record told her supervisor of the discrepancy the same day.[6] The supervisor conceded she was aware of it, but claimed the first time she saw it was at the trial.[7] Despite this discrepancy, no data comparison, and without investigation, the County gave the City the machine count to consider.

At what was called the City's canvass meeting the City only "accepted" the County's submitted number.[8] The canvassers merely "rubber stamped"[9] the number the County gave them. Kootenai County's Prosecuting Attorney was informed the absentee ballot record did not match the County total. The Prosecutor said he would investigate.[10] On November 16, 2009 the same election clerk printed a second absentee ballot record. This second absentee ballot record again documented that a total of 2041 non-voided absentee ballots had been returned.[11] The Prosecutor suggested that the person review of Chapter 20 Title 34 election contest.[12]

The day after the complaint was filed, the attorneys for the City, County, and the other candidate for Seat 2 (Kennedy) met to devise a coordinated effort to defeat the contest.[13] The concerted effort continued even after the County was removed as a defendant.[14] The

[5] Plaintiff's Exhibit 5, p. 185. English confirmed, at trial, that this record did not Void one vote of a person, Harris, for whom two ballots were recorded as being returned. Thus the total non-Voided absentee ballots returned was 2041.
[6] Tr. p. 293, l. 3-9.
[7] Tr. p. 669, l. 1-3.
[8] Tr. p. 101, l. 14-17.
[9] May 14, 2010 Hearing Tr. p. 41, l. 9-16.
[10] Plaintiff's Exhibit 47.
[11] Plaintiff's Exhibit 8A. See footnote 5 for further information regarding 2041.
[12] Plaintiff's Exhibit 47.
[13] Plaintiff's Exhibits 48, 50, 51
[14] Plaintiffs Exhibit 55 pages 1-2.

County sought a protective order when Brannon sought to examine the City's election documents it held the County claimed the examination would cost "at a minimum, $30,000.[15] On April 29, 2010, Brannon sought to review Beard's e-mails from Kootenai County. The County responded that its former election supervisor's computer had been 'cleared' and her e-mails "were not available." County's former election supervisor's computer had been "cleared" and her e-mails "were not available."[16]

Brannon's investigator contacted two voters, Harris and Prior, residing in Hayden but who voted in City's election. Both persons stated they probably voted for Kennedy.[17] When their depositions were taken, they could not recall how they voted. At trial they both testified they could not recall.[18]

Brannon subpoenaed for deposition Ainsworth, a county resident who voted in the City election. With the goading of a Spokane newspaper's internet 'blog', he tried to turn his deposition into a circus. Ainsworth posted comments on a blog that he "voted legally and proudly for Mike Kennedy," that he intended to wear a 'Speedo' and an "I love Mike Kennedy t-shirt" to his deposition, and that he was giving his witness fee check to the "Mike Kennedy Defense fund." He posted "This is getting FUN:)" Ainsworth's deposition was cancelled to prevent this circus attitude from escalating. At trial, Kennedy stipulated Ainsworth voted illegally for him.

The court asked Kennedy's counsel if he wanted to discuss the bond amount. Kennedy's counsel responded that he would be making an application at a future date. The district court stated it would be happy to listen. Kennedy's counsel responded that he hadn't

[15] R. p. 527-528. When combined with the initial cost order it would have cost $70,000 to begin investigation.
[16] Plaintiff's Exhibit 98.
[17] Tr. p. 762-772.
[18] Tr. p. 700-709.

done any calculation but suggested $25,000.00. The district court set the bond at $40,000.00.[19] Brannon sought reconsideration and the bond was reduced to $5,000.

J. Hosack granted reconsideration and made the City and City Clerk parties. J. Hosack ordered Sr. Magistrate Eugene Marano to conduct a physical count of all physically existing absentee ballots that were cast and counted in the election. This count occurred on June 22, 2010 under the direct supervision of Carrie Phillips, the sole custodian of the election absentee ballots. Philips opened the three marked locked absentee ballot boxes. She told Marano these absentee ballots "constituted all of the absentee ballots counted in the 2009 City of Coeur d'Alene General Election." Marano counted a total of 2027 absentee ballots. On July 2, 2011 Marano was asked to do another count. The County's former employee election supervisor, Beard, who was not and had not been the custodian of the election ballots since November 30, 2009, gave Marano additional absentee ballots to count. He counted seven (7). There is no evidence where these ballots came from. Phillips, the sole custodian of the election ballots, was not present at this count and didn't know about it until sometime after it occurred. On July 14, 2010 Marano was asked to do another count. Phillips handed Marano more ballots which she referred to as "duplicate ballots." Marano counted seventeen (17). There is no evidence where these ballots came from.

On August 5, 2010 Kennedy's counsel filed a motion for the district court to hold a non-party in contempt of court for posting a copy of his affidavit on the internet. The motion was supported by another non-party's affidavit who, after being served with a subpoena posted a comment on the aforementioned 'blog' that she was going contribute the witness fees to Kennedy. A hearing was held on the contempt complaint on September 7, 2010.

[19] March 2, 2010 Hearing Tr. p. 67-68.

Brannon's counsel was not in attendance but was told J. Hosack had made very disturbing comments. A copy of the contempt hearing transcript was obtained on September 11, 2010. After reviewing the transcript Brannon's counseled filed a motion supported by affidavit on September 13, 2010, because it was a bench trial, to disqualify J. Hosack from presiding on the grounds of bias and prejudice.[20] The motion was denied.

ARGUMENT

1. It was error to deny Brannon's motion to disqualify.

The standard of review is whether there was an abuse of discretion.[21] This issue is raised because in a bench trial the consideration of a motion to disqualify for bias or prejudice is critical to the fairness of the trial. It is the trial judge's province to make factual findings and discretionary decisions that impact the trial and its result that are only subject to deferential review on appeal. A trial court's discretionary decisions will only be set aside for an abuse of discretion.[22] There are numerous times during a bench trial when a judge, with bias or prejudice, will make findings, resolve evidentiary issues and determine the credibility of witnesses.[23] Rulings will be tainted by the judge's bias and prejudice and will significantly impact the trial and the judge's decision.[24] The right to due process under the Idaho and U.S. Constitutions requires an impartial judge.[25] The court trial was scheduled to commence on September 13, 2010. A motion to disqualify Judge Hosack for cause was filed on September

[20] R. p. 2083.
[21] *Pizzuto v. State, 127 Idaho 469, 903 P. 2d 58 (1995).*
[22] *Arthur v. Shoshone County, 133 Idaho 854, 993 P. 2d 617 (Idaho App. 2000).*
[23] The district court determined that two illegal voters' (Harris and Prior) testimony was credible despite the fact that each told an investigator for Brannon, mere days before their depositions were to be taken, that they voted for Kennedy. At their depositions, and at trial, they stated they couldn't remember whether they voted for Kennedy or Brannon. Finding them to be not credible would have made the vote difference, even under the court's findings, one (1) vote.
[24] *Arthur v. Shoshone County, 133 Idaho 854, 857, 993 P. 2d 617 (Idaho App. 2000).*
[25] *Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927), U.S. Constitution 14th Amendment, Idaho Constitution Article I §13.*

13th prior to the start trial. The motion was heard immediately prior to the commencement of trial and denied.

In reviewing the denial of a motion to disqualify, the Court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason.[26]

Discretion: The district court did not state that he perceived the issue as one of discretion.

Boundaries of discretion consistent with legal standards: The district court did not identify or address the legal standards applicable. Once a motion is filed with an accompanying affidavit, the judge must pass on the legal sufficiency of the affidavit, not the truth of the matters alleged.[27] If the affidavit shows the objectionable inclination or disposition of the judge, it is his duty to proceed no further.[28] The demonstration of "pervasive bias" must be derived from outside of events occurring at trial, and it must be "so extreme as to display clear inability to render fair judgment."[29] The district court did not address the sufficiency of the affidavit. It never claimed the comments did not accurately state his opinions against election contests and procedures. The denial of the motion was not based upon any analysis. The district court chose to brush them aside by asserting that that they were made in a "proceeding that...has absolutely nothing to do with this case. So that's

[26] *Blanc v. State, 36294, 36295 (IDCCA); State v. Hedger, 115 Idaho 598, 600, 768 P. 2d 1331, 1333 (1989)*
[27] *Berger v. United States, 255 U.S. 22, 41 S. Ct. 230, 65 L. Ed. 481 (1921).*
[28] *Berger v. United States, 255 U.S. 22, 35, 41 S. Ct. 230, 65 L. Ed. 481 (1921).*
[29] *Idaho Dept. of Health & Welfare v. Doe, 150 Idaho 752, 250 P. 3d 803 (Idaho App. 2011) citing Bach v. Bagley, 148 Idaho 784, 229 P. 3d 1146 (2010).*

how I can proceed."[30] The district court's denial of the motion to disqualify made from the bench failed to identify any standards and didn't deny that the court held the opinions. The bias or prejudice of the district court is set forth in the transcript of the contempt hearings.[31] The comments beginning on page 30 of the September 7th hearing transcript are:

> On the other hand, the Court has a concern in this litigation about the rights of the citizen voters. This type of litigation which may be and no doubt is and should be important in litigants has a ramification upon the average voter that in the view of this court is not a salutary connotation. And there's been arguments even made in open court that because this is an election case, a court should exercise extraordinary powers never used in civil litigation before in the history of American jurisprudence and haul citizens back at their own cost into court for a hearing for trial because they voted. That's very disturbing to this court. The wisdom of the American democracy is not delivered by the fiercely partisan voting. The wisdom of the American democracy is delivered by the average citizen that goes down to the voting place on the day of the election and votes as they see best to serve their community and does so out of public duty. Not because they have some crusade or some test point that they want to prove, but because they want to see their community work. To have litigation, publishing voters' names, calling in whether their affidavits are correct, whether they're legal or illegal, whether they can be hauled into court, grilled by a judge with regard to their votes, is an anathema to everything about our democratic process. So the secrecy, the confidentiality, the privacy of the voter is of paramount concern to the Court, and some apparent disregard of those issues by litigants or participants is of concern to this court.

The elements of democratic elections are concisely set forth in the U.S. Department of State Publication, *USA Democracy in Brief (2008)*:

> "Democratic Elections…
> Whatever the exact system, election processes must be seen as fair...and, if necessary, institute procedures for...resolving election disputes."

The on the record comments are pervasive as the derogatory comments made by Judge Landis in *Berger v. United States*[32] regarding Germans. J. Hosack's comments were directed

[30] Tr. p. 31, l. 18-20. Additionally, as will be shown below, J. Hosack's statements have everything to do with his rulings and decision in this case.
[31] R. p. 2083.
[32] *Berger v. United States, 41 S. Ct. 230, 255 U.S. 22 (1921)*

at this election contest and reflect that he viewed it as "an anathema" to our democratic form of government.

A decision by an exercise of reason: The district court failed to make any effort to disavow his expressed views. It asserted Brannon's counsel had a "misunderstanding"[33], the comments were focused on a proceeding that had "nothing to do with this trial[34], and that Brannon's counsel must have some "emotional baggage involved."[35] No ruling on the sufficiency of the affidavit was made. Consistent with its earlier expressed perspective that "it's more important to make a prompt decision, frankly, than the right one,"[36] the goal to bring the perceived anathema to the election process to an end, the district court paid no heed to his responsibility to step aside, and moved on to the trial and his preordained outcome.

The district court's comments exposed its deeply held bias and prejudice towards election contests to be of such an extreme nature that they rendered him unable to render a fair judgment. The hearing transcript of the judge's biased and prejudicial view was filed with the disqualifying affidavit[37]. An anathema is something that is cursed, damned, greatly reviled, loathed, or shunned.[38] A judge holding such a deeply held conviction could not be impartial. Denial of the motion to disqualify deprived Brannon of his fundamental due process right to a fair and impartial judge. All action taken after the filing of the affidavit, including the judgment, are void.[39]

ARGUMENT

2. The district court erred in holding that non-city residents are

[33] Tr. p. 26, l. 10-15.
[34] Tr. p. 31, p. 16-18.
[35] Tr. p. 29, 24-25.
[36] June 14, 2010 Hearing Tr. p. 35, l. 12-13.
[37] R. p. 2089.
[38] R. p. 2060.
[39] *Lewiston Lime Co. v. Barney, 87 Idaho 462, 394 P. 2d 323 (1964).*

entitled to have their votes counted in the municipal election based upon the Uniformed and Overseas Citizens Absentee Voting Act 42 U.S.C. 1973ff et seq.(UOCAVA).

This presents a question of statutory interpretation over which the Court exercises free review.[40] Brannon challenged the error that occurred when absentee ballots were sent, received, and even forwarded to non-city residents who had not even applied for them and to non-city residents not in the "United States service." The district court concluded that these non-city residents of the City were "Qualified Electors"[41] entitled to vote in the Municipality's 2009 General Election.[42] The district court acknowledged that, what it referred to as "the issue of UOCAVA votes," relates to alleged irregularities in the election process.[43] This "UOCAVA" issue impacts I.C. § 34-2001 (1) malconduct sufficient to change the result, (5) illegal votes received sufficient to change the result, and (6) error in counting votes.

At least five (5) non-city resident and non-United States service absentee ballot voters (Paquin, Farkes, Friend, Dobslaff[44] and Gagnon) received absentee ballots that were counted in the election. The district court held the Seat 2 race was decided by 3 votes without deducting these non-city resident votes. These five (5) absentee ballot votes are sufficient to change the result of the election. It was established that none of the five (5) absentee voters resided in the City, none lived at the address which they claimed on their respective

[40] *State v. Doe, 147 Idaho 326, 208 P. 3d 730 (2009); Hayden Lake Fire Protection Dist. v. Alcorn, 141 Idaho 388, 111 P. 3d 73 (2005)*
[41] I.C. § 50-402 (c).
[42] The most cogent examples of the district court's reasoning are set forth at Tr. p. 877-881 and the Memorandum Decision, R. p. 2279, 2282-2284.
[43] R. 2282.
[44] The district court only addressed four (4) in his memorandum decision. It ruled in open court on Dobslaff.

registration cards as their "residence," and none of them could be found within Kootenai County for service of a subpoena on them.[45]

Of these five (5) non-resident absentee ballot voters only Gagnon had ever been in the United States service. At the time she received and she returned her absentee ballot she was not in the United States service. Additionally, Gagnon had never resided in the City. Her mother-in-law testified Gagnon's address was in Petaluma, California and that Gagnon had never resided in the City.[46] Gagnon's only connection to the City was that she was married to a person in the U.S. Coast Guard.[47]

Even if UOCAVA applied to municipal elections under the Idaho Municipal Election Laws, Gagnon would not be entitled to vote in an election in city of her "in service" husband's residence. No person obtains voting "residency" based solely on the fact of the marriage. Beard wasn't aware whether or not a husband and wife, depending upon where they had previously actually resided, would have different residences for voting purposes.[48] Under UOCAVA a person must be able to establish that prior to being in the "United States service," the person was a resident of the municipality for at least thirty (30) days.[49] The instructions for submitting a Federal Write-In Absentee Ballot, Standard Form 186 A (Rev. 10-2005) require that the applicable residence address is that of the absentee ballot applicant where the person "ACTUALLY LIVED" previously.

UOCAVA has never applied to municipal elections in Idaho. The Idaho Municipal Election Laws only provide for persons who are in the "United States service" as provided

[45] R. p. 1827-1841
[46] Tr. p. 720-721, l. 1-2.
[47] Tr. p. 721, l. 3-25.
[48] Tr. p. 821, l. 2-7.
[49] I.C. § 50-402 (c)

for in the "Federal Voting Assistance Act of 1955." (FVAA 1955) I.C. § 50-443 is specific in this regard. After FVAA 1955 was repealed in 1986, the Idaho legislature did not amend I.C. § 50-443. For county and state elections the Idaho legislature amended I.C. § 34-410A. When the legislature amends a statute, the Court assumes that it knows of existing precedent and intends for it to have a different meaning from the meaning accorded the statute before amendment.[50] City election residency requirements are different than residency requirements for federal, state, county elections.

With the federal repeal of FVAA 1955 and the enactment of UOCAVA, to the extent it did not change the provisions of FVAA 1955, it is construed as remaining in force.[51] Only the FVAA 1955 provisions pertaining to persons in the "United States service" continued in force.

The district court acknowledged that the residency requirements of the Idaho Municipal Elections Laws are different than the state and county residence requirements.

> "The municipal statute is slightly different from the residence of—under the state law."[52]

The Chief Deputy for the Secretary of State's Office, Mr. Hurst, confirmed that the Idaho Municipal Election Laws are different than the county and state for determining residency.

> "Q. So just because a person is a resident for county voting purposes or state purposes or national purposes, if they're not a resident of the City of Coeur d'Alene, they don't qualify under that statute (I.C. § 50-443) do they?"
> A. Under the statute, no.[53]

[50] *Stewart v. Pacific Hide & Fur Depot, 138 Idaho 509, 512, 65 P. 3d 531, 534 (2003).*
[51] See *State v. Nichols, 110 Idaho 823, 718 P. 2d 1261, 1265 (Idaho App. 1986; Ellenwood v. Cramer, 75 Idaho 338, 272 P. 2d 702, 706 (1954); Stafford v. Kootenai County, 37320-2010 (IDSCCI), April 20, 2011.*
[52] Tr. p. 878, l. 23-25.
[53] Tr. p. 455, l. 20-25.

English, the County Clerk, testified he thought that UOCAVA are military voters, spouses of military voters, missionaries, or embassy workers.[54] Beard thought anyone living outside the United States was a qualified City voter just because they filed a "UOCAVA" form. If a UOCAVA form is received from a non-city resident absentee ballot applicant, the investigation into a person's residency "wouldn't have—have went any further."[55] Beard testified that, despite her "reliance" on UOCAVA, she never said that she was aware of the federal election laws.[56]

The district court acknowledged that "the language is there that would allow" a more restrictive residency requirement.[57] The district court stated that it was "not comfortable making the legal ruling" that when a person under federal law can vote for president that the person cannot vote in a municipal election.[58] This represents a fundamental misapplication of the municipal statute and of the important differences between the "political community" used by legislatures to determine who is entitled to vote in various elections. The applicable "political community" is different for federal, state, county, and city elections. The district court, even after receiving live testimony from Dobslaff over the internet, via Skype, held that Dobslaff was a city resident for the purpose of the City's election. Examples of non-city residents the district court held were entitled to have their vote counted in the municipal election are:

1. Dobslaff has been a permanent resident ("landed immigrant") of Canada since 1988. In order to maintain this status she can only leave Canada for a total of three

[54] Tr. p. 155, l. 13-18.
[55] Tr. p. 812, l. 15-19.
[56] Tr. p. 821,l. 8-13.
[57] Tr. p. 879, l. 18-21
[58] Tr. p. 880, l. 10-17.

months in any give five (5) year period of time. Her primary home or place of abode, since 1988, is Vernon, British Columbia.[59]

2. Gagnon is not in the United States service and never resided in the City.[60]
3. Paquin had not resided in City for at least two (2) years. She has resided in, and works in, Montreal, Canada.[61]
4. Farkes had not resided at the residence claimed on her registration card for at least five (5) years. She represented as being unknown to the persons residing at that address.[62]
5. Friend resides in Nelson, British Columbia, [63] and he had not lived at the commercial address on his registration card for at least five (5) years[64]

The U.S. Supreme Court has consistently held that by statute states:

1. Have the power to require voters be bona fide residents of the relevant political subdivision.[65]
2. May define residence to preserve the basic conception of a political community.[66]

Idaho's Municipal Election Laws restrict a person's right to vote by:

1. Requiring a person to be a resident for at least 30 days next preceding the election.[67]
2. Requiring that before an absentee ballot is sent out that:
   a. The person have a registration card on file; and
   b. The person is lawfully entitled to vote in the pending election.[68]

The county's election supervisor, Beard, testified no investigation was undertaken into whether a person filing a UOCAVA form was "lawfully entitled to vote" as required by statute, regardless of how many years had passed since the registration card was filed.[69] The residences for Dobslaff, and Friend,[70] who didn't request absentee ballots for the election, were automatically "presumed" to be the addresses on the registration card[71] and they were

[59] Tr. p. 857-877.
[60] Tr. p. 720-721.
[61] R. p. 1830-1831.
[62] R. p. 1833-1834
[63] R. p. 1554.
[64] R. p. 1836-1837.
[65] *Dunn v. Blumstein, 405 U.S. 330 (1972)*
[66] Id., p. 343-344
[67] I. C. § 50-402.
[68] I.C. § 50-445.
[69] Tr. p. 634, l. 21-25, p. 635, l. 1-14.
[70] Tr. p. 647,l. 5-14.
[71] Tr. p. 633, l. 11-17.

automatically sent absentee ballots. Beard asserted that the elections office was not the "election police,"[72] and in ridicule of the requirement to verify that a person was "lawfully entitled to vote," testified that she did not conduct "bed checks."[73]

The U.S. Supreme Court explained how quickly and easily a voter's *bona fide* residence can be determined:

> "...the job of detecting nonresidents from among persons who have registered is a relatively simple one...Objective evidence tendered as relevant to the question of *bona fide* residence under Tennessee law—places of dwelling, occupation, car registration, driver's license property owned, etc. is easy to double check, especially in light of modern communications."[74]

Idaho Municipal Election Law, I.C. § 50-402 (d) (1), requires that similar information be investigated in order to determine whether a person is "lawfully entitled to vote."

Counting the absentee ballots of these five (5) non-city resident persons because they filed a UOCAVA form resulted in error sufficient enough to change the outcome of the race regarding Seat 2 that was decided by three (3) votes.

ARGUMENT

3. The district court erred in refusing to order the non-city residents who returned absentee ballots to testify as to their residence and for whom they cast their vote.

The question of the existence of personal jurisdiction is a question of law which the Court reviews freely.[75] The Court exercises free review over matters of statutory interpretation.[76]

---

[72] Tr. p. 639, l. 3-8.
[73] Tr.p. 691, 4-9.
[74] *Dunn v. Blumstein, 405 U.S. 330, 348.*
[75] *Blimka v. My Web Wholesaler, LLC, 143 Idaho 723, 152 P. 3d 594 (2007).*
[76] *State v. Doe, 147 Idaho 326, 208 P. 3d 730 (2009); Hayden Lake Fire Protection Dist. v. Alcorn, 141 Idaho 388, 111 P. 3d 73 (2005)*

Brannon initiated contacts with five persons (Paquin, Friend, Farkes, Dobslaff, and Gagnon) whose absentee ballots were counted in the election but whose residences were not in the City. Only Paquin, Dobslaff and Gagnon even initially responded questions from Brannon as to their residence. The contacts with Paquin and Gagnon ceased completely. Dobslaff finally agreed to testify over the internet via Skype[77] from her home in Vernon, British Columbia.

Kennedy's attorney (Reed) interfered and prevented all communications with non-city resident absentee ballot voter Paquin who was living in Montreal, Canada. Paquin, after agreeing to sign an affidavit and confirming she voted for Kennedy, changed her mind and advised Brannon's attorney by e-mail:

> "If you need to contact me again Scott Reed (Mike's attorney) has my home email address and phone number."[78]

Despite numerous written requests Reed refused to provide Brannon's counsel with Paquin's contact information. Paquin without question cast her absentee ballot vote for Kennedy.[79]

It was also established that Reed had conversations with Farkes regarding her having voted in the City election by absentee ballot. Reed advised both Paquin and Farkes that "an Idaho court could not compel a person in Canada to appear as a witness in at trial."[80]

Brannon moved the district court to issue an order compelling Paquin, Dobslaff, Farkes, Friend, and Gagnon to testify in order to establish they were residents of the City.[81] Each of these persons, who voted by absentee ballot, were not capable of being served with subpoena in Kootenai County to compel their attendance. All of them were residing outside

[77] Tr. p. 854
[78] R. p. 596-597.
[79] R. p. 599.
[80] R. p. 1695.
[81] R. p. 1554-1555.

of the State of Idaho.[82] The election contest statutes provide the mechanism to compel the testimony of non-resident voters.

> Election contest procedures are intended to ensure that only city residents vote.
> "34-2013. Procedure in general.—The procedure shall be held according to the Idaho Rules of Civil Procedure so far as practicable, but shall be under the control and direction of the court, which shall have all the powers necessary to the right hearing and determination of the matter; to compel attendance of witnesses...to punish for contempt in its presence or by disobedience to its lawful mandate..."
> "34-2017. Voters to testify as to qualifications.—(a) The court may require any person called as a witness, who voted at such election, to answer touching his qualifications as a voter;..."

The district court denied the request to issue the orders.[83] It felt that the election contest was "civil litigation." [84] It limited itself to the rules of civil procedure and refused to consider the specific election contest provisions authorizing the issuance of these orders. The district court stated that it believed that Brannon's counsel was asking the court to assist "in the business of recruiting and providing witnesses" and "to devise a different rule for elections."[85] The district court held "there's no legal basis"[86] for it to exercise power never heard of in the history of American jurisprudence.[87]

Idaho law is well established that a determination of whether or not a court should exercise personal jurisdiction over a person, outside the boundaries of its subpoena power, is dependent upon an analysis of the specific facts under the Due Process Clause of the U.S. and Idaho constitutions.[88]

---

[82] R. 1827-1841.
[83] Ths request was the subject of the district court's comments when it revealed it's bias and prejudice.
[84] August 31, 2010 Hearing Tr. p. 51, l. 6-7.
[85] August 31, 2010 Hearing Tr. p. 51, l. 11-18.
[86] August 31, 2010 Hearing Tr. p. 52, l. 5.
[87] R. p. 2118.
[88] *Blimka v. My Web Wholesaler, LLC, 143 Idaho 723, 152 P. 3d 594 (2007).*

The two types of personal jurisdiction are "general" and "specific." For an individual the "paradigm forum for the exercise of general jurisdiction is the individual's domicile."[89] Each of the five (5) UOCAVA voters claimed City residency and the right to vote.

With regard to all of these absentee ballot voters (Paquin, Farkes, Friend, Gagnon, and Dobslaff) Brannon presented the court with affidavits establishing the inability to serve these persons with subpoenas.

The "specific" personal jurisdiction question over these persons depends on whether each respective person's involvement the suit "arises out of or relates to the person's contacts with the state."[90] If a person purposely avails himself of the privilege of conducting activities in a state, and thus invoking the benefits of its laws, that person is subject to the jurisdiction of the state courts.[91] By voting in City's election claiming to be residents of the City, each of these persons subjected themselves to the jurisdiction of the district court in the election contest.

Once a person takes a specific act, such as voting, he submits to the jurisdiction of the court, and it becomes a question of "traditional notions of fair play and substantial justice."[92] The purity of elections in this country has always been seen as being of vital importance upon which hangs the "experiment of self-government."[93] If a state has a significant interest in redressing injuries that occur within the state under a state's long-arm statute, it certainly has a significant interest in the conduct and fairness of its elections.

---

[89] *Goodyear Dunlop Tires Operations, S.A. v. Brown, __U.S.__131 S. Ct. 2846 (2011).*
[90] see fn 250.
[91] *Saint Alphonsus Regional Medical Center v. State of Wash. 123 Idaho 739, 852 P. 2d 491 (1993)*
[92] *McIntyre Machinery, Ltd. v. Nicastro, __U.S.__, 131 S. Ct. 2780 (2011).*
[93] *A Treatise on the American Law of Elections*, George W. McCrary, 1875, see R. p. 1593

Idaho's long-arm statute is co-extensive with all of the jurisdiction available to this state under the due process clause of the United States Constitution.[94] The long arm statute specifically applies to the ownership, use or possession of any real property in this state. It provides a convenient analogy consistent with due process. In order to be a qualified elector in a municipality a person must be a resident of the municipality. Municipal residency requires a person's principal or primary home or place of abode in which a person's habitation is fixed to be in the city.[95] This requirement is no different than the "use or possession" of real property. A subpoena, unable to be served, subjects the person to no penalty for failure to testify and establish their residence and "lawful entitlement to vote."[96] The issuance of an order that could be served on a person residing outside of Idaho would compel the person's presence upon penalty of contempt.

All citizens of the City have an interest in adjudicating whether the election was held properly under the law and only legal ballots from voters residing in the City were counted. The United States and Idaho constitutional due process provisions require that an analysis of the burden on the absentee voter be a consideration, too.[97] As the U.S. Supreme Court noted as early as 1958, the progress in communications and transportation has made the exercise of jurisdiction over non-residents less burdensome.

There is no reason to believe that Paquin, Gagnon, Farkes, and Friend would not have responded appropriately to the order and not been able to testify through the internet on Skype just as Dobslaff testified.

---

[94] *Knutsen v. Cloud, 142 Idaho 148, 124 P. 3d 1024 (2005).*
[95] I. C. § 50-402 (d) (1).
[96] Tr. p. 46, l. 7-15.
[97] *Smally v. Kaiser, 130 Idaho 909, 950 P. 2d 1284 (1997).*

The cavalier, "who cares," attitude of the non-city resident absentee voters in this election underscores the necessity of a court to order that they testify. Paquin, whose conduct was likely the result of the advice that Kennedy's attorney gave her that an Idaho court had no authority over her, is illustrative. She "paraded about", with the encouragement of the Spokane newspaper blog, challenging the very concept of "residency" requirements for voting in a city election. She proclaimed it was "ridiculous" for Brannon to question her residency in such a election: Canada Voter: Brannon Suit Silly

> Monica Paquin, a former resident of Coeur d'Alene now living in the Montreal area.. And all she did was send her absentee ballot back after voting for long-time friend Mike Kennedy. ...She was told by Kootenai County officials that she could vote in her last place of residence in the United States as long as she didn't vote elsewhere. Monica, who works for a Washington company, is classified as a "permanent resident' in Canada, and has no idea when she will return to the United States...she...considers Brannon's effort to overthrow a local election "ridiculous."[98]

The district court's refusal to order them to testify precluded Brannon from challenging their residency and right to vote. This violated Brannon's due process rights under the U.S. and Idaho Constitutions.[99]

Kennedy's attorney Reed's argument against issuing the order reinforces the foundation of Brannon's argument:

> "It is hardly surprising that the out-of-state residents after initially replying to questions from a private investigator, decided that they did not want to become involved in a city council election of no importance to them..."[100]

The district court acknowledged the impact of his refusal by noting that regardless of whether or not he correctly applied UOCAVA, it didn't matter:

> "there's no indication as to how they voted...If you don't have any of them testify, you haven't proved anything."[101]

---

[98] R. p. 598.
[99] U.S. Constitution 14th Amendment, Article I § 13 Idaho Constitution
[100] R. p. 2002.

> "Even if all were found to be illegal residents, because there is no evidence of how they voted, any illegality of their residence cannot impact the outcome of the election and is therefore irrelevant."[102]

The district court erred determining Dobslaff to be a "resident" of the City and not allowing Brannon to establish for whom she voted in the Seat 2 race. The district court erred in not issuing its order compelling the other four (4) non-city residents to testify and finding Dobslaff was a City resident entitled to vote. In the Seat 2 race these five (5) votes were sufficient to change the result of the election

ARGUMENT

4. The district court erred in dismissing the claim of malconduct, refusing to permit the complaint to be subsequently amended to assert a claim of malconduct, and holding that there was insufficient evidence in the record to find malconduct.

The Court exercises free review over matters of statutory interpretation.[103] When the district court dismissed all claims against the City and City Clerk, the malconduct claim was dismissed but not addressed.[104] The district court (J. Hosack) granted the motion to rejoin the City and City Clerk. The district court labeled the statutory malconduct claim as nothing more than "inflammatory rhetoric."[105] Consistent with its prejudice and bias against election contests, it simply did not want malconduct addressed at trial. At trial the motion was renewed, but it was denied in the memorandum decision. The basis of the denial is narrow.

> "This Court has denied the motion to amend on the grounds the County was not a party."[106]

Idaho's Municipal Election Laws in effect in 2009 require that:

1. The City Clerk is the chief elections officer and shall exercise the

---

[101] December 7, 2010, Hearing Tr. p. 81, l. 16-25.
[102] R. p. 2262.
[103] *State v. Doe, 147 Idaho 326, 208 P. 3d 730 (2009); Hayden Lake Fire Protection Dist. v. Alcorn, 141 Idaho 388, 111 P. 3d 73 (2005)*
[104] March 2, 2010 Hearing Tr. p. 63, l. 24-25, p. 64, l. 1-2.
[105] August 31, 2010 Hearing Tr. p. 31, l. 17-8.
[106] R. p. 2296.

administration of the election laws in his city for the purpose of achieving and maintaining a maximum degree of correctness, impartiality, efficiency and uniformity.[107]

3. The City Clerk shall issue instructions to ensure uniformity in the application, operation and interpretation of the election laws during the election.[108]
4. Any person adversely affected by any act or failure to act by the city clerk under any election law or by an order, rule, regulation, directive or instruction made under authority of the city clerk under any election law may appeal to the district court.[109]

The election laws in effect in 2009 authorize a City Clerk only to "employ such persons...he considers necessary to facilitate and assist his carrying out his functions in connection with administration of the election laws.[110] Even if some of the City's contract with the County (Defendants' Exhibit B) can be held to fall within this grant of authority, the employed person cannot totally assume all the City Clerk's statutory election responsibilities.

The district court erred by holding the County was an "independent contractor" and thus the City and City Clerk were totally absolved of any election responsibility. The City and City Clerk have defined statutory responsibilities. This is acknowledged in the contract. The City had the right to "specify the time and place of performance, and the results to be achieved." It remained the City and Clerk's responsibility to ensure compliance with Idaho Municipal Election Laws. Additionally, under the contract the County agreed to indemnify the City against any action "arising out of or in connection with the acts and/or performance or activities."[111] Without responsibility, that provision was not necessary. Even in the private sector setting the district court decision constitutes error. The Court's holding in *Baily v.*

[107] I.C. § 50-403.
[108] I.C. § 50-403.
[109] I.C. § 50-406.
[110] I.C. § 50-404.
[111] Defendants' Exhibit B, p. 3, paragraph 5.

Ness[112] is contrary to the holding of the district court. A principal is responsible for an agent's wrongful acts, "so long as the agent has acted within the course and scope of authority delegated by the principal." Express authority and implied authority are forms of actual authority. Express authority is that authority which the principal has explicitly granted the agent to act in the principal's name. Implied authority refers to the authority necessary, usual, and proper to accomplish or perform the express authority delegated to the agent by the principal. The contract intended to grant the County the authority to act in the City's name. The contract was what provided the County the authority necessary to conduct the City's election.

There is no statutory rule of construction that would lead to a conclusion that the City and City Clerk did not have the responsibility to ensure the election was in compliance with the Idaho Municipal Election Laws. The 2009 Idaho Municipal Election Laws require that the mayor and council shall canvass the results of the election.[113] There is no statutory rule of construction that supports an interpretation of this statute that anyone else may canvass the election for the mayor and council.

J. Simpson's dismissal of the City made the malconduct claim a victim of the erroroneous dismissal. J. Hosack's refusal to permit the malconduct claim when he reinstated the City and City Clerk into the election contest was based on an erroneous standard that "even if it is alleged, it isn't sufficient to change the result in any way other than the illegal

[112] *Bailey v. Ness, 109 Idaho 495, 708 P. 2d 900 (1985).*
[113] I.C. § 50-467.

votes."[114] The district court's decision held that even if the County were a party, the irregularities alleged in the proposed amended complaint fail to state a malconduct claim.[115]

The memorandum decision asserted that the "proposed amended complaint" has nothing to do with Brannon's motion during trial. However the district court was no longer dealing with allegations. It was evaluating evidence in the record. The issue before the district court was whether the issue of malconduct had been tried.[116] The district court did hold that there was insufficient evidence in the record to establish malconduct, but its decision was founded upon its interpretation that "proof of fraud or corruption" was required to establish malconduct.[117] Under its analysis that "the only thing that the city did was receive what the county did and said we got this from the county,"[118] and since "the city is not vicariously liable,"[119] there was no evidence in the record upon which it could find malconduct because the County conducted the election.

Substantial competent evidence of the County's malconduct sufficient to change the election result was introduced. While the statute does not define malconduct, as early as 1890 it was recognized that conduct resulting in unfair elections which permit illegal votes to be cast and counted are within the statutory provisions.[120] *Chamberlain v. Woodin*[121] did not limit what constituted malconduct. In 1899, in *Ball v. Campbell*,[122] the Court stated "Should a judge of election, after his attention has been called to an infraction of the law, refuse or neglect to proceed at once against the derelict, then, indeed, might there be some ground for

[114] May 14, 2010 Hearing Tr. p. 47, l. 10-18, p. 48,l. 16-19.
[115] R. p. 2296-2297.
[116] *Noble v. Ada County Elections, Bd., 135 Idaho 495, 20 P. 3d 679 (Idaho2000).*
[117] R. p. 2294.
[118] August 31, 2010 Hearing Tr. p.39, l. 13-15.
[119] August 31, 2010 Hearing Tr. p. 40, l. 23.
[120] *Chamberlain v. Woodin, 2 Idaho 642, 23 P. 177 (1890).*
[121] *Chamberlain v. Woodin, 2 Idaho 642, 23 P. 177 (1890).*
[122] *Ball v. Campbell, 6 Idaho 754, 59 P. 559 (Idaho 1899).*

charging him with malconduct." In 1917, in *Huffaker v. Edgington,*[123] the Court required that irregularities in the conduct of the election "cast serious doubts upon the results of the election." In *Noble v. Ada County Elections Bd.*[124] the Court held that failure "to follow every election procedure precisely, *without more*, is insufficient."

That Idaho courts have grappled with defining malconduct is no surprise. Just as every election race is different, so too are the types of, and degree and extent of, the failures to comply with statutorily mandated procedures that may occur in the process. Justice Potter Stewart's comment that "I know it when I see it"[125] is perhaps as precise as a "definition" that can be attached to "malconduct" in the statute. The dynamics of an election require the determination of malconduct to be made on a case by case basis. The Idaho legislature, despite the ongoing struggle in election contests to define malconduct, has chosen to not define it even in the laws effective in 2011.

Failure to follow Idaho's Municipal Election Laws was rampant in the 2009 City General Election. Some failures were more egregious than others. Some failures were sufficient to change the result for Seat 2. Collectively the failures represent an election run in total disregard of the Idaho Municipal Election Laws and an outcome, at least regarding Seat 2, that could not be verified.

This total collapse of the election process could be attributed to the City's wholesale delegation of its statutory election duties to the County. The testimony of the County Clerk, English, painfully revealed that he personally had little knowledge of the Idaho Municipal Election Laws and no practical understanding of how a City election is required to be

[123] *Huffaker v. Edgington, 30 Idaho 179, 163 (Idaho 1917).*
[124] *Noble v. Ada County Elections Bd., 135 Idaho 495, 20 P. 3d 679 (Idaho 2000).*
[125] *Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L. Ed. 2d 793 (1964).*

conducted under them. His elections office supervisor, Beard, testified that Title 34, not Title 50 chapter 4 Municipal Election Laws, governed City elections.[126]

The following are examples of failures to follow laws sufficient to change the election result.

FAILURE TO VERIFY RESIDENCY

I.C. § 50-443 requires, before any person is provided an absentee ballot, the Clerk must first verify that the person is (1) registered and then (2) lawfully entitled to vote. This two-step evaluation must be completed before a person can be found to be entitled to receive an absentee ballot.

Despite the fact that residency requirements for city elections are different from county or state elections,[127] the registration cards used for the City election did not require the person affirm they were a resident of the City. They only required that the person affirm they were a resident of a respective county or the state.[128]

The County did not conduct any investigation into whether a person, with a registration card was "lawfully entitled to vote." The only investigation consisted of entering the name into the statewide database to see if there was a registration card.[129] This is the same database that Beard later asserted was not accurate.[130] If the database revealed any registration card, even one ten (10) years old, Beard made the determination, on her own, that the person was "lawfully entitled to vote,"

"Q. What does your office do then to determine lawfully entitled to vote?

[126] Tr. p. 615, l. 1-9; Plaintiff's Exhibit 101, p. 5.
[127] Tr. p. 454, l. 16-25; p. 455, l. 20-23; p. 456, l. 4-8.
[128] Tr. p. 456, l. 19-25; p. 457, l. 1-2.
[129] Tr. p. 657, l. 23-25, p. 658, l. 1-4.
[130] Tr. p. 698, l. 16-22; p.668, l. 8-16.

A. Well, the registration card would make them eligible to vote."[131]

According to Beard,

"Q. …other than looking at the registration card…you don't make any further investigation into where a person's residence is 30 days prior to the election?
A. No."[132]

Timothy Hurst, Chief Deputy for the Secretary of State's Office, testified:

"Q. To be a resident lawfully entitled to vote in a municipal election you just testified you have to be a resident of the city for 30 days prior to the election, correct?
A. That's right.
Q. So just because a person is a resident for county voting purposes or state purposes or national purposes, if they're not a resident of the City of Coeur d'Alene, they don't qualify under that statute, do they?
A. Under the statute, no."[133]

I.C. § 50-443 requires a person to "make application" for an absentee ballot to vote in an approaching election. In the 2009 City election absentee ballots were automatically sent to anyone who had previously applied for an absentee ballot in a state or federal election. The persons sending out absentee ballots didn't even wait for a person to apply for an absentee ballot for the 2009 election. A previous absentee ballot application submitted by any non-city resident was just copied and a 2009 City absentee ballot automatically sent to them.[134]

I. C. § 50-443 specifically references the "Federal Voting Assistance Act of 1955" and provides that persons" in the United States service may apply for an absent elector's ballot. This statute has never been amended. However, a different federal law, the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)[135] that is more expansive for federal

[131] Tr. p. 648, l. 10-13.
[132] Tr. p. 657, l. 23-25, p. 658, l. 1-4.
[133] Tr. p. 455, l. 20-25, p. 1-8.
[134] Tr. p. 645, 646, 647. Examples, Paquin, Friend, and Dobslaff)
[135] 42 U.S.C. section 1973 et seq.).

elections was automatically used by Beard for the City election. Absentee ballots were sent to persons who were not "in the United States service"[136] and even those who did not apply.[137]

FAILURE TO KEEP ABSENTEE BALLOT RECORD

I.C. 50-451 requires that an absentee ballot record be kept and available to be examined by the public. It provides:

> The city clerk shall keep a record in his office containing a list of names and precinct numbers of electors making applications for absent 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."

Chief Deputy Secretary of State Timothy A. Hurst testified the "absentee ballot record" serves three purposes in ensuring correctness of elections.

1. Make sure that people don't vote twice.[138]
2. Validate that the number of absentee ballots that are tabulated match the number of ballots that were received.
3, Compare the number of absentee ballots counted with the number received.[139]

Hurst testified the failure to timely keep the absentee ballot record in the 2009 election was a violation of the clerk's duty.

> "Q. Do you have an opinion as the chief deputy for the Secretary of State's office regarding elections as to whether or not it would be a failure of an official's duty, the clerk, to keep those two records, 50-451 and 34-1011?[140]
> A. Apparently not doing his duty if he doesn't keep them."[141]

Beard conceded that the "absentee ballot record" is required.[142] County Clerk English testified no "absentee ballot record" was kept. English *relied* on the state's database. Beard thought the required absentee ballot record was the state's database.[143] However when it was established the database recorded that at least ten (10) fewer legal absentee ballots were

[136] Examples are Paquin, Dobslaff, Friend, Farkes, and Gagnon.
[137] Examples are Paquin and Dobslaff.
[138] This actually occurred in this election. Tr. p. 210, l. 23-25, p. 211, l. 1-8.
[139] Tr. p. 433, l. 25, p. 434, l. 1-15.
[140] I.C. § 34-1011 pertains to a county election clerk's duty to maintain an "absentee ballot record".
[141] Tr. p. 444, l. 5-11.
[142] Tr. p. 667, l. 24-25, p. 668, l. 1-7.
[143] Tr. p. 699, l. 3-8.

returned than were counted, she claimed the database was inaccurate.[144] However there was *no testimony that the November 6, 2009, absentee ballot record*, Plaintiff's Exhibit 5, was not accurate. The first absentee ballot record was first printed two (2) days after Beard had already prepared the "District Canvass," and she never compared the two. The "absentee ballot record" is Plaintiff's Exhibit 5.[145] English testified the November 6th "absentee ballot record" documents *all* absentee ballots. He confirmed that the absentee ballot report documents that a total of 2041 non-void absentee ballots were returned.[146] Beard admitted she was aware of Plaintiff's Exhibit 5,[147] but claimed the first time she saw it was during the trial in this matter.[148] Apparently it wasn't a concern for her because Susan Smith, the election clerk who prepared this "absentee ballot record", testified *she "*was sure that I told my supervisor (Beard) that I had prepared this report,"[149] "on the same day*"[150]* she printed it. Beard's election department computer was cleaned, and information that was on it was represented to Brannon as being not available, so proving what records she had was not possible.[151] Beard acted as the only and self-appointed judge of the election. Nonetheless she knowingly failed to keep an absentee ballot record, and she knowingly failed to compare the machine count with that record, or any other record, before providing the tally to the City. She prepared the "District Canvass," and she knew or should have known on November 6, 2009 that absentee ballot record documented that ten (10) fewer legal absentee ballots were returned (2041) than were counted by machine (2051). Beard's knowing failure to compare

[144] Tr. p. 698, l. 16-22; p. 668, l. 8-16. Plaintiff's Exhibit 5 was never called inaccurate. It was the "only" evidence of the number of non-voided absentee ballots received.
[145] Tr. p. 192, l. 4-9; Plaintiff's Exhibits p. 1, Exhibit 5
[146] Tr. p. 193, l. 22-25, p. 194, l. 1.
[147] Tr. p. 669, l. 4-15.
[148] Tr. p. 669, l. 1-3.
[149] Tr. p. 293, l. 3-9.
[150] Tr. p. 293, l. 7-9.
[151] Plaintiff's Exhibit 98.

the machine tally with any record before giving the machine tally to the mayor and council impacted the Seat 2 election in a manner sufficient to change the result.

The Kootenai County Prosecuting Attorney was informed on November 16, 2009, the absentee ballot record documented that fewer legal absentee ballots were received than were counted.[152] On the same day a second "absentee ballot record" was printed. It also documented more legal ballots were machine counted than were returned.[153] Beard could not recall whether or not the Prosecutor contacted her about this question.[154] The Prosecutor implied he contacted someone in the elections department. English testified he didn't know details about the election process, and likely person contacted was Beard. The Prosecuting Attorney told the person who informed him of the discrepancy, "I suggest you look at Chapter 20 of Title 34.[155] Despite this e-mail record, the Prosecutor testified he "just didn't recall" if he contacted anyone. He couldn't recall if he spoke to English or his deputy [Beard].[156] The fact that Beard's computer was "cleaned" didn't raise any concerns for the Prosecutor despite the ongoing election contest.[157]

However apparently enough concerns were raised, because the County began an attempt to locate anything that would substantiate the machine count of 2051 absentee ballots. A third "absentee ballot record" was printed on November 24, 2009. This record documented that 2043 non-voided absentee ballots were returned. Even this third absentee ballot record documents that more ballots were counted than non-Voided absentee ballots were returned.

[152] Plaintiff's Exhibit 47.
[153] Footnote 196 is also applicable here.
[154] Tr. p. 669,l. 16-20.
[155] Plaintiff's Exhibit 47.
[156] Tr. p. 399, 16-25, p. 400, l. 1-20.
[157] Tr. p. 419-421.

Once it became clear a trial would not be prevented the County printed a fourth absentee ballot record on August 19, 2010.[158] This record also didn't help the County establish that the number of absentee ballots that were not "Voided" upon return, equaled the number of ballots that were machine counted. It documented 2019 non-voided absentee ballots as being returned. Phillips, testified that the record:

> "identifies each and every absentee ballot request received by Kootenai County for the November 3, 2009 City of Coeur d'Alene General Election."[159]

Something had to be done to discredit the November 6, 2009 absentee ballot record," the only evidence," that documented that 2041 non-voided absentee ballots were received. Somehow the 2051 absentee ballots counted had to be accepted by the district court, thus testimony that the database is dynamic, which means a person may be deleted by a clerk or county[160] because voters may have changed their residence.[161] Hurst testified the *database* "isn't necessarily accurate."[162] The district court used this testimony to find that "relying on the database system is not justified," because it is "known to be inaccurate."[163] Whether or not the database was unreliable has nothing to do with Hurst's testimony that Plaintiff's Exhibit 5, the November 6, 2009 absentee ballot record, could only have been off by four (4) ballots, so the maximum number of legal ballots that could have been received was 2045, not 2051. Hurst searched the state's entire database to determine whether anybody who is not documented in the November 6, 2009 absentee ballot record as having returned an absentee ballot might have had their name removed from the list. Hurst investigated all persons who voted in the 2009 City election. Hurst testified that a total of four (4) voters had moved, and

[158] Plaintiff's Exhibit 26.
[159] Plaintiff's Exhibit 26, p. 2.
[160] Tr. p. 698, l. 22-24.
[161] Tr. p. 444, l. 20-24, p. 465, l. 12-24.
[162] Tr. p. 444, l. 25, p. 445, l. 1-4.
[163] Memorandum decision, R. p. 2290.

their names had been removed.[164] He could not be determine whether these persons had voted in person or by absentee ballot in the election.[165]

Since the state's entire database documented only four (4) persons who voted in the City election had moved their names removed since the election, Hurst testified that if it were assumed that all four (4) of these persons voted by absentee ballot, the total number of persons who returned legal absentee ballot in the City's election was 2045. Thus the total number of number of absentee ballots counted by machine (2051) was six (6) more than the total number of legal (not "Voided"[166]) absentee ballots (2045) that were received for the election.[167] Despite acknowledging it was aware of the voided ballots[168] the district court failed to deduct the 6 voided absentee ballots from the **total** of 2051 absentee ballots that it found were returned. The correction of this calculation error establishes that the absentee ballot tally given to the City was *inaccurate* by six (6) absentee ballots. Six (6) is sufficient to change the result of the three (3) vote Brannon-Kennedy Seat 2 race.

Chief Deputy Hurst testified the only evidence as to the total number of non-voided absentee ballots received for the election was 2041.

> "Q….what is the only evidence available as to the total number of absentee ballots that were legally received on or before 8:00 p.m. on November 3rd, 2009?
> A. The only evidence that I have seen is this…Exhibit 5[169]…
> Q. …And that reflects 2042[170], correct?
> A. Yes."[171]

[164] Tr. p.465, l. 25, p. 466, l. 21.
[165] Tr. p. 466, l. 22-25, p. 467, l. 1.
[166] Plaintiff's Exhibit 5, p. 178.
[167] Tr. p. 467, l. 2-18.
[168] R. p. 2289.
[169] Tr. p. 442, l. 16-21
[170] Which total is actually 2041 because as English testified, one voter had voted two absentee ballots, and one was not declared void as it should have been.
[171] Tr. p. 442, l. 24-25, p. 443, l. 1.

The ballot counting machine's only function is to tabulate the number of ballots that were run through it.[172] Despite the fact that more absentee ballots were counted than legal (non-voided) absentee ballots were received, records that were claimed were kept such as the daily absentee ballot logs and audit trails[173] were not offered into evidence to establish that 2051 legal (non-voided) absentee ballots were in fact received. The district court's finding that "the County did in fact count 2051 valid absentee ballots sent in by 2051 absentee voters"[174] is not supported by competent evidence.[175]

FAILURE TO KEEP ANY SECONDARY ABSENTEE BALLOT RECORDS

Idaho Municipal Election Laws require back-up accounting records but none were kept.

Poll Books.

An absentee ballot precinct was established by the County. It was precinct number 0073 CDA Absentee Precinct.[176] I.C. §§ 50-428 requires a poll book to be maintained for each precinct. I.C. § 50-450 requires that upon receipt of an absentee ballot, it is to be checked with the poll book and the absentee elector's name entered in the poll book as if he had been present and voted. This was not done. If the numbers do not agree, the election judges have to decide what to do. This was not done. The City Clerk did not even know if there *was* a poll book for the absentee ballot precinct, and she didn't review any poll books. Despite Beard's claim that an absentee precinct does not have poll book,[177] I.C. § 50-465 requires that *before* counting *any* precinct's ballots, the number of ballots must equal the

[172] Tr. P. 664, L. 19-25, p. 665, l. 1-3.
[173] Tr. p. 698, l. 8-12.
[174] Memorandum Decision, R. p. 2292.
[175] *Noble v. Ada County Elections Bd. 135 Idaho 495, 20 P. 3d 679 (2000).*
[176] Plaintiff's Exhibit 85.
[177] Tr. p. 673, l. 16.

number of ballots in the poll book. If the number does not agree, the election judges are supposed to decide what to do. This was not done. Beard didn't try to compare the number of absentee ballots the machines counted to *any* report to verify that the total of legal absentee ballots received equaled the number of absentee ballots counted.[178] Beard prepared the "District Canvass" from the machine printout without comparing that number with any record to verify that the machine count number equaled the number of legal absentee ballots returned.

Even when poll books were kept, they failed to identify what ballot a person was given. Fifty three (53) persons are recorded in poll books as casting votes, but there is no record of whether they were given City, County, or Fernan ballots. It is undisputed that at least one known person, County resident Zellars,[179] was given a City ballot that was illegally counted. Fernan resident Chadderdon was erroneously given a City ballot. She had to correct the poll worker and get the correct ballot before voting.[180] With no poll record identifying which ballot these fifty three (53) voters received it can't be established what ballot they received, and voted. Given that two (2) voters received the wrong ballots and with no way to establish which ballot 53 other voters received and voted, there is no way to prove these persons voted on the proper ballot. If just three (3) received and voted incorrect ballots, it would be sufficient to change the election results.

Canvass by mayor and council—the last ditch safeguard

The Idaho Municipal Election Laws mandate the City Council has specific duties to perform. I.C. § 50-467. Canvassing votes—Determining results of election.

[178] Tr. p. 666, l. 8-10.
[179] Tr. p. 784.
[180] Tr. p. 659-660.

"The mayor and the city council, within six (6) days following any election, shall meet for the purpose of canvassing the results of the election."

One of the alleged grounds of contest of an election is for "any error in any board of canvassers in counting votes" sufficient to change the result of the election.[181] The mayor and council failed to perform any count of votes. No canvass occurred.

The City Clerk testified that she had no part in the preparation of the "District Canvass."[182] The mayor and council literally did nothing more than accept the tally presented by the County. No questions were asked.[183] The City Clerk testified:

"A. That's what a canvass of votes is is accepting the tabulation of an election. And that's what the council did."[184]
"A. The County does not do a canvass. The County tabulates the votes. The council does the canvass by their motion of accepting their tabulation of votes. That's a canvass."[185]
"A..They're [the County] the ones that count them."[186]

Municipality's attorney, Gridley, confirmed that no count of votes was made by the mayor and council. The counting of the votes was "delegated to the county."[187]

The City Clerk testified that she prepared canvass meeting minutes.[188] They do not document that councilman Bruning, whom the minutes reflect seconded the motion, was even present at the meeting. City attorney Gridley, testified that he did not know who seconded the County canvass acceptance motion.[189] Municipality's trial attorney Haman represented that the vote numbers are prepared by the county and presented to the council as a mere formality, a 'rubber stamp' of the County's information.

[181] I.C. § 34-2001 (6).
[182] Plaintiff's Exhibit 85.
[183] Tr. p. 99, l. 15-23, Plaintiff's Exhibit 86, R. p. 241.
[184] Tr. p. 99, l. 21-23.
[185] Tr. p. 101, l. 14-17.
[186] Tr. p. 103, l. 2.
[187] Tr. p. 565, l. 18-25.
[188] Plaintiff's Exhibit 87, R. p. 242,
[189] Tr. p. 562, l. 14-18,

> "Mr. Haman: (City's trial attorney) It's a formality that whenever there is an election, the County, in this instance, tallied up the results, came to an official, sent it to—under the statute, you've got six days—the County has six days to tally it up, basically, make it final, give it to what is called a Board of Canvass, or canvass the election, the City accepts it. In fact, it's a rubber stamp."[190] (emphasis added)

If the mayor and council had not failed to perform their duty and had actually conducted the canvass required, all ballot issues including the number of legal absentee ballots cast and counted would have been reconciled according to law. Instead these issues were exacerbated by Beard with her determination to "allow all votes without making technical disqualifications."[191]

> Extraordinary attempt by Brannon to verify the number of legal absentee ballots received. The Court-ordered count of absentee ballots counted in the election did not match the number of absentee ballots reported to have been machine counted.

English said the most reasonable way to eliminate the ballot number discrepancy was to count the ballots.[192] The district court ordered that Sr. Magistrate Marano physically count all the absentee ballots that were counted in the 2009 Municipal Election. At all times prior to Marano's count the ballots had been either held at the Sheriff's office, under lock and key, or in Phillips' actual possession.[193] Phillips was present when the absentee ballots were transported from locked storage at the Sheriff's office to her office for counting by Marano.[194] Marano's count took place on June 22, 2010.[195] Phillips unsealed the three locked ballot boxes containing the received and counted absentee ballots for the Municipality's 2009 election. The side of each of these three locked absentee ballot boxes identified the ballot

[190] May14, 2010 Hearing Tr. p. 41, l. 9-16.
[191] Plaintiff's Exhibit 101, p. 6.
[192] Plaintiff's Exhibit 90, p. 4, paragraph 12.
[193] Tr. p. 370, l. 12-23.
[194] Tr. p. 602, l. 5-7.
[195] Tr. p. 342, l. 19-20.

counting machine that had counted the absentee ballots. They were "machine #3 A", "machine #3 B" and "machine #4".[196]

Marano testified that on June 22, 2010:

> "I commenced counting the actual absentee ballots received and counted in the 2009 City of Coeur d'Alene General Election."[197]
>
> "After my completion of the counting of the counted absentee ballots from the ballot boxes from machine #3 A, machine #3 B, and machine 4, I was advised by Carrie Phillips that those absentee ballots constituted all of the absentee ballots counted in the 2009 City of Coeur d'Alene General Election."[198]
>
> "I was informed [by Carrie Phillips] that duplicate absentee ballots are ballots that for one reason or another would not run through the counting machine…"
>
> "I then added the totals from the written accounting, that I had contemporaneously prepared, and I arrived at a total of 2027 absentee ballots counted in the 2009 City of Coeur d'Alene General Election. This number does not include the 17 duplicate ballots."[199]

Phillips told Marano that the ballots she gave to him to count were "all of the absentee ballot counted in the 2009 City of Coeur d'Alene General Election." It is presumed that ballots kept according to law are the true ballots.[200] Marano's official count was 2027 absentee ballots which is 24 fewer than the machine count given to the City.

Ten (10) days later , July 2, 2010, Marano was asked to return to count "other ballots that had been located later."[201] Phillips, the sole legal custodian of the absentee ballots, was not present.[202] She did not how or where the "other ballots" were found. She did not testify

[196] Plaintiff's Exhibit 97, R. p. 312-313 paragraph 5, 5 a, 5, b, 5 c..
[197] Plaintiff's Exhibit 97, R. p. 312, paragraph 5.
[198] Plaintiff's Exhibit 97, R. p. 313.
[199] Tr. p. 347, l. 17-20;p. 378, l. 16-22. Plaintiff's Exhibit 97, page 3 paragraph 6.
[200] *A Treatise on the American Law of Elections*, p. 287-288, Geo. W. McCrary, 1875. This is part of the public domain and available on the internet.
[201] Tr. p. 347, . 22-25
[202] Tr. p. 591, l. 5-8.

what the "other ballots" were. She was only made aware that it [the count] occurred after the fact.[203] Marano testified Beard gave him a ballot box with a label indicating Coeur d'Alene write-in ballots 11/3/09. He did not testify, and neither did Beard, what machine they may have been counted through. At the time of this count Beard had not been an employee of Kootenai County for over seven months.[204] Beard was not the legal custodian of the absentee ballots. She had no authority to access, handle or possess any absentee ballots.[205] Marano wasn't told what it was he was counting. He testified, "I just counted seven."[206] If what Beard handed Marano were ballots, this was a classic "nonchalant and unsupervised" handling of ballots that was strenuously objected to by the County when it tried to prevent any examination.[207]On July 14, 2010 Marano, for a third time, returned to the elections department.

1. He was handed some documents to count, ballots.
2. He received 15 from Carrie Phillips and 2 from a person named Sherri Van Patten.
3. He was not told what they represented.[208]

Phillips testified "I'm not a hundred percent sure" how this meeting came about.[209] She said at the original time Marano "came to count the ballots[210] it was not brought up to see the original duplicates."[211] Neither Phillips nor anyone else provided any evidence where these

[203] Tr. p. 591, l. 2-8.
[204] Plaintiff's Exhibit 101, R. p. 324. Not only was Beard not an employee, her computer containing her e-mails regarding the election had been cleaned prior to May 6, 2010, and the e-mails were thus "not available." Plaintiff's Exhibit 98, p. 316.
[205] I.C. § 34-2018 confirms that only the person in possession or custody of ballots handle them.
[206] Tr. p. 348, l. 19-24.
[207] R. p. 520.
[208] Tr. p. 349, l. 12-25, p. 350, p. 351, l. 1-2.
[209] Tr. p. 593, l. 4-5.
[210] Marano was ordered to count the absentee ballots cast and counted at the election. He did so. He counted and repeatedly testified that there were 2027 absentee ballots that were cast and counted in the election. Carrie Phillips, as reflected in Marano's Affidavit, Plaintiff's Exhibit 97, R. 311 establishes that Phillips told him that he was given "all of the absentee ballots" at that time. Plaintiff's Exhibit 97, R. 313.
[211] Tr. p. 593, l. 5-9.

"duplicate ballots" came from, when or how they were found, or whether they too had been maintained in her custody or under lock and key at the Sheriff's office facility.

The official count of actual absentee ballots in the presence of their lawful custodian [Phillips] occurred on June 22, 2009. The total absentee ballots counted by the election machines, as is 2027. At the close of Marano's testimony he was asked, once and for all, to confirm that the total number of absentee ballots counted in the 2009 election was 2027. Kennedy's counsel objected because the evidence was clear as to the number Marano counted.

> "Mr. Erbland: ...This is—the point's been driven home again and again. Why use six nails when one will do?[212] (emphasis added)

Marano, testified:

> "Q…So as the court-designated counter, tell me to the best of your knowledge and information how many absentee ballots that were counted in the 2009 City of Coeur d'Alene election did you come up with?...(objection and argument deleted)[213]
> 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 if that was—if I was correct the last time?
> Q. Yep.
> A. Yes."[214]

Marano's count established that twenty (24) absentee ballots fewer absentee ballots existed than were recorded by the machine tabulations. The *reason* for Marano's count was to establish the ballot number. This is a sufficient number to change the result in a 3 vote race.

Void absentee ballot intentionally counted.

I.C. § 50-447 requires that when an absentee ballot is received, but before it can be accepted for counting, the signature on the envelope must be compared with the signature on the

[212] Tr. p. 378, l. 9-11.
[213] Kennedy's counsel argued "the points been driven home again and again. Why use six nails when one will do?" Tr. P. 378, l. 9-11.
[214] Tr. p. 377, l. 16-25, p. 378, l. 1-22.

registration card. Beard testified that an absentee ballot envelope sent to Israel Melendez was received back with a signature of 'Donna Melendez.' She further testified that she did not know if she even tried to call Israel Melendez to attempt to ascertain if he had filled out the ballot and sent back in the return envelope. Without a signature on the envelope matching his registration form, the envelope and the enclosed ballot should have been voided. It was not voided. This is one (1) more absentee ballot that should have been recorded as "Voided" on the absentee ballot record and not counted. It was counted.[215]

ARGUMENT

5. The district court erred in finding that the county counted 2051 valid absentee ballots based upon envelopes

The standard of review for district court's bench trial finding is whether it is "clearly erroneous"[216] and whether it is supported by and competent evidence in the record.[217]

There is no competent evidence in the record that substantiates the district court's finding that 2051 envelopes each containing one legal absentee ballot were received.[218]

Even if it is assumed that a total of 2051 absentee ballot envelopes were returned and that there was only one absentee ballot per envelope, there can only be a total of 2051 absentee ballots in existence. In order to support the court's finding that "the County did in fact count 2051 valid absentee ballots sent in by 2051 valid absentee voters,"[219] every absentee ballot in existence would have to have been a valid ballot. *That is an impossibility* because English testified, and all evidence establishes, that at least five (5) of the returned

[215] Plaintiff's Exhibit 5, page 108 documents the return of this absentee ballot and it not being Voided.
[216] *Pace v. Hymas, 111 Idaho 581, 726 P. 2d 693 (1986).*
[217] *Noble v. Ada County Election Bd., 135 Idaho 495, 20 P. 3d 679 (2000).*
[218] Memorandum Decision, R. p. 2292.
[219] Memorandum Decision, R. p. 2292.

absentee ballots returned were voided and one was a double vote entry.[220] At a maximum only 2045 legal (non-voided") absentee ballots were returned to be counted. Using the district court's 2051 and deducting the six (6) received absentee ballots that were voided, there can only be a total of 2045 absentee ballots that were non-voided, and legal, to be counted. I.C. § 50-451 reinforces the obvious that voided ballots are not to be counted. Simply, if 2051 absentee ballots were in fact machine counted, the "voided" absentee ballots had to have been counted illegally. This number is sufficient to change the election result for Seat 2.

ARGUMENT

6. The district court's finding that there was no error in counting votes or declaring the election result is not supported by competent evidence.[221]

The standard of review is whether the decision was "clearly erroneous."[222] There must be no competent evidence in support of the finding.[223]

I.C. § 34-2001 (6) provides for an election to be set aside "for any error in any board of canvassers in counting votes or in declaring the result of the election if the error would change the result." The City's mayor and council are the board of canvassers. The canvassing statute in 2009 provided:

> The mayor and council, within six (6) days following any election, shall meet for the purpose of canvassing the results of the election. Upon acceptance of the tabulation of votes prepared by the election judges and clerks, and the canvass as herein provided, the results of both shall be entered in the minutes of proceedings and proclaimed as final..."

This section requires three separate actions to be taken by the mayor and the city council:

1. Canvass the results of the election;

[220] Tr. p. 213, l. 15-25, p. 214, l. 1-9.
[221] Memorandum Decision, R. p. 2279.
[222] *Pace v. Hymas, 111 Idaho 581, 726 P. 2d 693 (1986)*
[223] *Noble v. Ada County Election Bd., 135 Idaho 495, 20 P. 3d 679 (2000).*

2. After the canvass has been completed, accept the tabulation of votes;
3. After the canvass has been completed, accept the canvass.

Brannon attempted to elicit from Gridley what he, as the City's attorney, told the mayor and city council to do in conducting a canvass. This question was objected to, and the objection was sustained as "privileged" legal advice from him to the mayor and city council.[224] Gridley was then asked what advice, if any, he provided as to the canvass. This was objected to and sustained, but he went ahead and answered, "I don't know.[225] Gridley also testified that he "didn't know" if he ever discussed a canvass with the mayor and council.[226] When asked if he ever suggested to the mayor and city council they should "count votes" he replied:

"A. No. That was delegated to the County per contract."[227]

The City Clerk testified that the mayor and council's sole action consisted of "accepting their [the County's] tabulation of votes."[228] The City Clerk testified: "That's a canvass."[229] English first testified that a canvass was what the mayor and council does when they "accept...the numbers that they have been provided.[230] When asked what his understanding of "counting votes" was, he testified that "I'm just not clear." [231]

Beard testified "we prepared for the canvass the next day" (November 4th) and that she printed out the "District Canvass", Plaintiff's Exhibit 85, p. 36.[232] In preparing the City's canvass Beard testified that she didn't compare the counting machine numbers with any other document.[233] Beard testified she printed off the "District Canvass", Plaintiff's Exhibit 85[234],

[224] Tr. p. 564, l. 19-25, p. 565, l. 1-4.
[225] Tr. p. 565, l. 5-10.
[226] Tr. p. 565, l. 11-15.
[227] Tr. p. 565, l. 16-25.
[228] Tr. p. 102, l. 11-16..
[229] Tr. p. 102, l. 17.
[230] Tr. p. 183, l. 14-23.
[231] Tr. p. 185, l. 13-25, p. 186, l. 1.
[232] Tr. p. 666, l. 12-25.
[233] Tr. p. 667, l. 1-12.

and that the data contained on it merely identifies the number of ballots run through the machine and how many votes, based on absentee ballots run through the machine, were counted for each candidate.[235] Beard failed to verify the total actual non-void absentee ballots received matched the number the machine software showed were counted. The district court, at the hearing on Brannon's motion for a new trial, unknowingly, put it best:

> "I understand in our society that, if we put things into a computer and have a printout, we all think that's golden and we'll believe it because it's computer generated so it's got to be right. But...it's only as good as the data entered."[236]"because you don't know what went into the data base."[237]

Machine data printed from the counting machine is not helpful, because the total number of absentee ballots recorded as being counted exceeded the number of legal absentee ballots returned. While the actual machine tabulations were never offered into evidence, if 2051 ballots were put into the machine to be counted, Brannon disputes that there were 2051 legal (non-voided) absentee ballots in existence.[238] Literally no evidence supports that 2051 non-voided absentee ballots exist. Without any evidence offered by Respondents through daily reports or audit trails to establish otherwise, the only way that the machine count could be 2051 is for illegal ballots to have been counted. There is no evidence that 2051 legal ballots existed to have been put into the machine and counted.

Since I.C. § 34-2001 (6) specifically provides that one ground of contest is "any error in any board of canvassers in counting votes," it has to be determined what a "canvass" is.

---

[234] Tr. p. 666, l. 22-25.
[235] Tr. p. 664, l.
[236] December 7, 2010, Hearing Tr. p. 79, l. 15-20.
[237] December 7, 2010, Hearing Tr. p. 80, l. 3-4.
[238] The November 6, 2009 absentee ballot record tabulated, without deducting the one of the two votes attributed to Harris, 2042 and Marano counted 2027.

The U.S. Election Assistance Commission (EAC) has published "Election Management Guidelines." Chapter 13 of these Guidelines address "Canvassing and Certifying an Election." Relevant portions of Chapter 13 provide:

> "INTRODUCTION...
> The purpose of the canvass is to account for every ballot cast and to ensure that each valid vote is included in the official results....the canvass means aggregating or confirming every valid ballot cast and counted—absentee, early voting, Election Day...The canvas enables an election official to resolve discrepancies, correct errors, and take any remedial action necessary to ensure completeness and accuracy before certifying the election." (emphasis added)

There is a reason why the Legislature gave the mayor and city council several days after the election in which to canvass the vote and to certify the results. As the Guidelines correctly go on to state:

> "In almost every election, exceptions and issues arise during voting that must be resolved."

The duty of the board of canvassers is to examine and resolve questions about these ballots.

> "* **Exceptions** include signature mismatches on absentee ballot envelopes or in the poll books, damaged ballots, overvoted ballots, count/no count determinations, and voter intent issues. In each exception situation the exceptions and ballot board will physically review the ballot and make a decision on how the ballot will be processed, in accordance with state laws and regulations.
> * **Issues** are ballots that have been counted incorrectly, have been counted in error, or have not been counted at all..."

The mayor and council did not undertake any such actions. Beard exercised unsupervised discretion in resolving all of these questions, and neither she nor any other election official informed the mayor and council of the decisions she made in the course of the election.[239]

1. When there was a question on an absentee ballot as to whether or not the signature on the affidavit on the back of the envelope is that of the elector casting that ballot, Beard made the final decision as to whether

[239] Beard's operating procedure was to allow "all votes without making technical disqualifications." Plaintiff's Exhibit 102, p. 6. Her unfettered liberality may not have been the same as the mayor and councils perspective on "technical disqualifications."

or not it is a valid ballot.[240]

2. When an absentee ballot return envelope came back with no signature on it but there was an address label or bar code, Beard would have someone try to notify the person that there was no signature and have them come in to the office, or she would send someone out to their house.[241] No record was kept of telephone calls made.[242]
3. When an absentee ballot return envelope comes in and the signature on the back does not match the signature on the registration card or even the name on the label, so long as there is an another envelope with the with the person's name on it then Beard allowed both to be counted.[243]
4. The board of canvassers did not review damaged ballots.
5. Beard made all decisions of whether or not to count an absentee ballot .[244]
6. Beard made no overvote determination. Beard made no determination whether ballots had been counted correctly or counted in error. Beard did not keep, or possess, the statutorily required absentee ballot record.[245] Beard didn't compare the machine count number with any other documentation.[246]

The Guidelines set forth methods for "accounting for votes following an election."

1. Inspection of the returns from voting sites—early voting sites, polling places, vote centers.
2. Review records of poll workers documenting any problems in the election.
3. Review all ballots that have to be duplicated before processing.
4. Review ballots that have been rejected.
5. Reconcile all ballots cast outside the polling place and precincts including regular absentee ballots and UOCAVA ballots.
6. Confirm that the number of accepted and rejected challenged ballots equal the number of challenged ballots cast.

The mayor and council did not perform any accounting. They did not conduct a canvass. Having not canvassed the election they could not lawfully "accept" the tabulation of the votes printed out from the machine by Beard. They could not have legally proceeded to the last step of a canvass to "accept the canvass" as required by I.C. § 50-467.

---

[240] Tr. p. 615, l. 22-25, p. 616, l. 1-11.
[241] Tr. 616, l. 19-25, p. 617, l. 1-4.
[242] Tr. p. 623, l. 9-13.
[243] Tr. p. 619, l. 16-25. I.C. § 50-447 does not provide that an absentee return envelope signed by a person whose name does not correspond to the name on the registration card for that ballot can be inferred to be the ballot of the person whose name is on the registration card. It is void.
[244] Tr. p. 615, l. 22-25.
[245] Tr. p. 667-668.
[246] Tr. p. 667, l. 1-12.

As if an exclamation point to the haphazard manner in which the election was conducted, the minutes of the canvass meeting fail to establish Bruning was present to second the motion to accept the County's tabulation. There is no evidence that the election results, although based upon the faulty tally, were even certified by the mayor and council. There is no competent evidence that supports the district court's determination that the mayor and council did not err in counting votes, and it erred in declaring the results of the election valid.

In the election for Seat 2, the district court found the difference in votes was three (3). All of the errors listed above would change the election result.

ARGUMENT

7. It was error for the district court to fail to shift the burden of proof to City and Kennedy after Brannon met his burden of proving a *prima facie* case that more absentee ballots were counted than the total number of non-voided absentee ballots in existence.

This presents a question of law over which the Court exercises free review. The general rule as to burden of proof applies in election contests.[247] The district court did not shift the burden of proof.

> "But there just isn't any legal basis for this Court to find that in this case I'm going to shift the burden of proof from the plaintiff to the defendant...I don't know what the reason for that would be other than the fact that it's an election case....I can't find an Idaho case that shifts the burden of proof. There just isn't any legal basis for this Court to shift the burden of proof."[248]

Brannon met his burden of proving a *prima facie* case. He introduced evidence establishing that the machine tally totaled more than the number of legal (non-voided) absentee ballots received by six (6). It was established also that there were four additional ballots of Proft, Ainsworth, White, and Zellars that were illegal because of residency and

[247] *Noble v. Ada County Elections Board, 135 Idaho 495, 20 P. 3d 679 (2000).*
[248] December 7, 2010, Hearing Tr. p. 86.

should not have been counted. Also, Marano testified that he counted only 2027 absentee ballots that were counted.[249] In short, no evidence was introduced that established that 2051 legal absentee ballots were machine counted, and every discrepancy established that more than three (3) votes were counted when they should not have been. Brannon met his burden of proof. The burden of proof should have shifted to the City and Kennedy to somehow prove otherwise. Respondents recognized that no evidence established that 2051 legal absentee ballots were, or could have been, counted. In closing arguments one of Kennedy's counsel conceded the failure of the evidence.

> "Mr. Erbland: I would have no objection to reopening the evidence and having Deedie Beard testify.[250]

The district court denied the offer."[251]

Brannon proved the elements of his case.

The district court, deeply concerned given its predilection against election contests, was particularly upset by Marano's testimony that established that only 2027 absentee ballots physically existed. The district court's outburst in the midst of Kennedy's closing argument is illustrative.

> "MR. ERBLAND: No, May I—may I quote Judge Marano's affidavit?
> THE COURT: Jesus.
> MR. ERBLAND: He says, I verified that there were 15 duplicate--
> THE COURT: Judge Marano doesn't know squat about the question that I'm asking. He doesn't know anything about what I am asking."[252]

The district court erred in not shifting the burden of proof to the City and Kennedy.

ARGUMENT

8. It was error to hold the City could contractually

[249] The only purpose of Marano's official count, on a date certain pursuant to court order, was to erase any question as to the number of absentee ballots in existence.
[250] September 18, 2010 Hearing Tr. p. 42, l. 15-17.
[251] September 18, 2010 Hearing Tr. p. 42, l. 17-18.
[252] September 18, 2010 Hearing Tr. p. 45, l. 3-9.

delegate all its election duties to the County.

The Court exercises free review over matters of statutory interpretation.[253] On August 18, 2009 the City adopted a resolution to contract to delegate all City officials' and employees' duties required pursuant to the Idaho Municipal Election Laws to the County.[254] The contract is Defendants' Exhibit B. The City attorney and the City Clerk confirmed the intent and the effect of the contract was a complete and total delegation of their duties and authority to the County.[255]

From 1993 until 2011 Idaho Municipal Election Laws expressly did not permit the delegation of all of the City's, City Clerk's, mayor and council's election duties to the County. Cities are units of local government. They assist in the governing of the state by providing local government functions to urban areas. This is referred to as "governmental" power.[256] The Idaho Constitution provides that cities may not act in conflict with general laws of the state.[257] General laws may confer direct authority to a City to act as well as supply procedural requirements for taking the action.[258]

Under Idaho's constitution, suffrage and elections are the sole province and duty of the state legislature.[259] Idaho has long recognized that a municipality, as a creature of the state, possesses and exercises only those powers either expressly or impliedly granted to it.[260] Title

[253] *State v. Doe, 147 Idaho 326, 208 P. 3d 730 (2009); Hayden Lake Fire Protection Dist. v. Alcorn, 141 Idaho 388, 111 P. 3d 73 (2005)*
[254] Defendants' Exhibit A.
[255] Tr. p. 565, l. 16-25, p. 106, p. 105, l. 17-25, p. 106, l. 1-24.
[256] see *Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?* Michael C. Moore, 14 Idaho L. Rev. 143 (1977-1978)/
[257] *Idaho Constitution, Article 2 § 2.*
[258] *Citizens For Better Government v. Valley County, 95, Idaho 320, 322, 508 P. 2d 550 (1973).*
[259] *Idaho Constitution, Article VI § 1.*
[260] *Caesar v. State, 101 Idaho 158, 160, 610 P. 2d 517 (1980)*

50, Chapter 4, of the Idaho Code, Idaho Municipal Election Laws, set forth the authority granted to the City and the procedure which a City is to follow in conducting a City election.

Idaho follows Dillon's Rule which provides:

> "Municipal corporations possess and can exercise the following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,--not simply convenient, but indispensible."[261]

The City's total delegation of all election duties to the County effectively destroyed the power given to it by the legislature. A city cannot act in an area so completely covered by general law as to indicate that it is a matter of state concern.[262] If a city enactment or action conflicts with state law, it is invalid.[263] The 2009 Election Manual for City Clerks instructs Cities and City Clerks that the "most significant election reform bill of the past several decades" will take effect in 2011[264]. All Respondents asserted that all the municipality's statutory election duties could be delegated to the County. The contract provides that "The City shall have *no* control over the performance of this agreement by the County."[265] Such an agreement expands the City's authority under the Idaho Municipal Election Laws. It renders superfluous the express wording of I.C. § 34-1401 that provides:

> "...and municipal elections governed by the provisions of chapter 4, title 50 are exempt from the provisions of this chapter. 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 election dates authorized in 34-106, Idaho Code, the registration procedures prescribed in section 34-1402, Idaho

---

[261] *Caesar v. State, 101 Idaho 158, 160, 610 P. 2d 517 (1980)Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?* Michael C. Moore, 14 Idaho L. Rev. 143, 146.
[262] *Id. p. 660.*
[263] *Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?* Michael C. Moore, 14 Idaho L. Rev.
[264] Defendants' Exhibit G, p. 8.
[265] Defendants' Exhibit A, p. 3, paragraph 4.

> Code, and the time the polls are open pursuant to section 34-1409, Idaho Code" (emphasis added)

When the legislature makes a municipality "exempt" from the provisions of a chapter it means that all the sections within the chapter are "inapplicable" to a municipality.[266] This statutory language was enacted in 1993. The legislature chose to not change this language until January 1, 2011. Courts do not presume that the legislature performed an idle act by enacting a meaningless provision.[267]

Respondents asserted the City Clerk had "authority to have anybody to carry out the election,"[268] and "Cities were released from liability in the event that any election did not conform to" election law.[269] The district court held the contract was a valid delegation based on the last paragraph of I.C. § 34-1401 that provided, *after excluding municipalities*, that:

> "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, et cetera."[270]

Brannon moved for reconsideration. The motion was denied. The district court stated:

> "...there is express statutory authority allowing the City to contract with the County"…there's ambiguities there…there's nothing in the statute that expressly prohibits the contracting between the City and the County…I can't think of any public policy reason as to why… the Court would enforce a rule of law that would require the average citizen to go to two different polling places on election day…I don't see any social or public policy served by the interpretation…it seems consistent with how you'd want to run an election."[271]

---

[266] see *Plummer v. City of Fruitland, 139 Idaho 810, 814, 87 P. 3d 297 (2004).*
[267] *Sweitzer v. Dean, 118 Idaho 568, 798 P. 2d 27, 31 (1990); Brown v. Caldwell School District No. 132, 127 Idaho 112, 898 P. 2d 43 (1995).*
[268] R. p. 149.
[269] R. p. 148.
[270] March 2, 2010 Hearing Tr. p. 63, l. 9-18.
[271] May 14, 2010 Hearing Tr. p. 10-11.

If a statute is unambiguous, statutory construction is unnecessary and courts apply the plain meaning.[272] With plain language a court must not undertake a process of construction to avoid its perception of an inconvenience to the public. In 1992 the legislature granted authority to municipalities and city clerks to delegate their election duties to the county clerk.

(1992)
CHAPTER 14
UNIFORM DISTRICT ELECTION LAW

SECTION 4. That Title 34, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW CHAPTER, to be known and designated as Chapter 14, Title 34, Idaho Code, and to read as follows:

> 34-1401. ELECTION ADMINISTRATION. Notwithstanding any provision to the contrary, the election official of each political subdivision shall administer all elections on behalf of any political subdivision, subject to the provisions of this chapter, including all municipal elections, special district elections, and elections of special questions submitted to the electors as provided in this chapter. School districts governed by title 33, Idaho Code, and water districts governed by chapter 6, title 42, Idaho Code, are exempt from the provisions of this chapter. For the purposes of achieving uniformity, the secretary of state shall, from time to time, provide directives and instructions to the various county clerks and political subdivision election officials. Unless a specific exception is provided in this chapter, the provisions of this chapter shall govern in all questions regarding the conduct of elections on behalf of all political subdivisions. In all matters not specifically covered by this chapter, other provisions of title 34, Idaho Code, governing elections shall prevail over any special provision which conflicts therewith. A political subdivision may contract with the county clerk to conduct 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.

In 1993, the Idaho Legislature amended this statute with two new statutory enactments. The House Bills presented to the legislators to review in their consideration of the proposed amendments to the 1992 law, graphically display through interlineation and addition the amendments enacted in 1993.

(1993)

HOUSE BILL NO. 330

[272] *Hayden Lake Fire Protection Dist. v. Alcorn 141 Idaho 307, 109 P. 3d 161 (2005)*

SECTION 5. That Section 34-1401, Idaho Code, as added by Chapter 176, Laws of 1992, be, and the same is hereby amended to read as follows:

34-1401. ELECTION ADMINISTRATION. Notwithstanding any provision to the contrary, the election official of each political subdivision shall administer all elections on behalf of any political subdivision, subject to the provisions of this chapter, including all ~~municipal elections,~~ special district elections, and elections of special questions submitted to the electors as provided in this chapter. School districts governed by title 33, Idaho Code, and water districts governed by chapter 6, title 42, Idaho Code, irrigation districts governed by title 43, Idaho Code, are exempt from the provisions of this chapter. 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, Idaho Code, and the time the polls are open pursuant to section 34-1409, Idaho Code. For the purposes of achieving uniformity, the secretary of state shall, from time to time, provide directives and instructions to the various county clerks and political subdivision election officials. Unless a specific exception is provided in this chapter, the provisions of this chapter shall govern in all questions regarding the conduct of elections on behalf of all political subdivisions. In all matters not specifically covered by this chapter, other provisions of title 34, Idaho Code, governing elections shall prevail over any special provision which conflicts therewith.

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.

34-1401. ELECTION ADMINISTRATION. Notwithstanding any provision to the contrary, the election official of each political subdivision shall administer all elections on behalf of any political subdivision, subject to the provisions of this chapter, including all ~~municipal elections,~~ special district elections, and elections of special questions submitted to the electors as provided in this chapter. School districts governed by title 33, Idaho Code, and water districts governed by chapter 6, title 42, Idaho Code, irrigation districts governed by title 43, Idaho Code, and municipal elections governed by the provisions of chapter 4, title 50, Idaho Code, are exempt from the provisions of this chapter. For the purposes of achieving uniformity, the secretary of state shall, from time to time, provide directives and instructions to the various county clerks and political subdivision election officials. Unless a specific exception is provided in this chapter, the provisions of this chapter shall govern in all questions regarding the conduct of elections on behalf of all political subdivisions. In all matters not specifically covered by this chapter, other provisions of title 34, Idaho Code, governing elections shall prevail over any special provision which conflicts therewith.

(1993)

HOUSE BILL NO. 335

SECTION 5. That Section 34-1401, Idaho Code, as added by Chapter 176, Laws of 1992, be, and the same is hereby amended to read as follows:

34-1401. ELECTION ADMINISTRATION. Notwithstanding any provision to the contrary, the election official of each political subdivision shall administer all elections on behalf of any political subdivision, subject to the provisions of this chapter, including all ~~municipal elections;~~ special district elections; and elections of special questions submitted to the electors as provided in this chapter. School districts governed by title 33, Idaho Code, and water districts governed by chapter 6, title 42, Idaho Code, irrigation districts governed by title 43, Idaho Code, are exempt from the provisions of this chapter. 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, Idaho Code, and the time the polls are open pursuant to section 34-1409, Idaho Code. For the purposes of achieving uniformity, the secretary of state shall, from time to time, provide directives and instructions to the various county clerks and political subdivision election officials. Unless a specific exception is provided in this chapter, the provisions of this chapter shall govern in all questions regarding the conduct of elections on behalf of all political subdivisions. In all matters not specifically covered by this chapter, other provisions of title 34, Idaho Code, governing elections shall prevail over any special provision which conflicts therewith.

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.

The 1993 amendments specifically *removed* the authority of municipalities to contract with counties to run their elections. However the City did not change how it ran its elections. In construing statutes the Court assumes that when a statute is amended that the legislature intended the statute to have a meaning different from the meaning accorded the statute before the amendment.[273] The district court erred in determining the legislation was too inconvenient for the public.[274]

> "I can't think of any public policy reason as to why you would have--why the Court would enforce a rule of law that would require the average citizen to go to two different polling places on election day to vote...I mean, that doesn't serve any democratic principles that I understand. I don't see any social or public policy served by the interpretation...[having the County conduct all election duties] seems

[273] *Stewart v. Pacific Hide & Fur Depot, 138 Idaho 509, 512, 65 P. 3d 531, 534 (2003).*
[274] No party asserted different polling places were required. That is the type of service that could be contracted.

to be consistent with how you'd want to run an election."[275]

Construction of a statute will not be followed if it contradicts the clear expression of the legislature. As the Court has previously stated:

> "The most fundamental premise underlying judicial review of the legislature's enactments is that, unless the result is palpably absurd, the courts must assume the legislature meant what it said."[276]

The legislature clearly spoke on who was required to conduct municipal elections and how they were required to be held from 1993 until 2011. The words of statutes are to be given their plain meaning unless a contrary legislative purpose is expressed or the plain meaning creates an absurd result.[277] The City Clerk, with assistance if he wanted it, was to conduct the election, and the City's mayor and council was required to conduct the canvass.

Effective, January 1, 2011, Idaho Legislature, reversed direction and changed its mind. New legislation was enacted that transferred all municipal election duties to the counties. The amendments also effectively highlight the changes that were made.

(EFFECTIVE 2011)

HOUSE BILL NO. 221

SECTION 58. That Section 34-1401, Idaho Code, be, and the same is hereby amended to read as follows:

34-1401. ELECTION ADMINISTRATION. Notwithstanding any provision to the contrary, the ~~election official of each political subdivision~~ county clerk shall administer all elections on behalf of any political subdivision, subject to the provisions of this chapter, including all special district elections and elections of special questions submitted to the electors as provided in this chapter. ~~School districts governed by title 33, Idaho Code, and~~ ~~w~~Water districts governed by chapter 6, title 42, Idaho Code, ground water recharge districts governed by chapter 42, title 42, Idaho Code, ground water management districts governed by chapter 51, title 42, Idaho Code, ground water districts governed by chapter 52, title 42, Idaho Code, and irrigation districts governed by title 43, Idaho Code, ~~ground water districts governed by chapter 52, title 42, Idaho Code, and municipal elections governed by the provisions of~~

[275] May 14, 2010 Hearing Tr. p. 10, l. 24-25, p. 11, l. 1-17.
[276] *State, Dep't of Law Enforcement v. One 1955 Willy's Jeep, 100 Idaho 150, 153, 595 P.2d 1206, 1219 (1991)*
[277] *State v. Doe, 147 Idaho 326, 208 P. 3d 730 (2009)*

~~chapter 4, title 50, Idaho Code,~~ are exempt from the provisions of this chapter. All municipal, school district and highway district elections shall be conducted pursuant to the provisions of this chapter 14, title ~~50~~34, 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, Idaho Code, and the time the polls are open pursuant to section 34-1409, Idaho Code~~. All highway district and school district elections shall be administered by the clerk of the county wherein the district lies. Elections in a joint school district shall be conducted jointly by the clerks of the respective counties, and the clerk of the home county shall exercise such powers as are necessary to coordinate the election. For the purposes of achieving uniformity, the secretary of state shall, from time to time, provide directives and instructions to the various county clerks ~~and political subdivision election officials~~. Unless a specific exception is provided in this chapter, the provisions of this chapter shall govern in all questions regarding the conduct of elections on behalf of all political subdivisions. In all matters not specifically covered by this chapter, other provisions of title 34, Idaho Code, governing elections shall prevail over any special provision which conflicts therewith.

~~A political subdivision may contract with t~~The county clerk ~~to~~ shall conduct ~~all or part of~~ the elections for ~~that~~ political subdivisions~~. In the event of such a contract, the county clerk~~ and 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.

~~chapter 4, title 50, Idaho Code,~~ are exempt from the provisions of this chapter. All municipal, school district and highway district elections shall be conducted pursuant to the provisions of this chapter 14, title ~~50~~34, 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, Idaho Code, and the time the polls are open pursuant to section 34-1409, Idaho Code~~. All highway district and school district elections shall be administered by the clerk of the county wherein the district lies. Elections in a joint school district shall be conducted jointly by the clerks of the respective counties, and the clerk of the home county shall exercise such powers as are necessary to coordinate the election. For the purposes of achieving uniformity, the secretary of state shall, from time to time, provide directives and instructions to the various county clerks ~~and political subdivision election officials~~. Unless a specific exception is provided in this chapter, the provisions of this chapter shall govern in all questions regarding the conduct of elections on behalf of all political subdivisions. In all matters not specifically covered by this chapter, other provisions of title 34, Idaho Code, governing elections shall prevail over any special provision which conflicts therewith.

~~A political subdivision may contract with t~~The county clerk ~~to~~ shall conduct ~~all or part of~~ the elections for ~~that~~ political subdivisions~~. In the event of such a contract, the county clerk~~ and 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.

...

(e) Election official. "Election official" means the city clerk, registrar, judge of election, clerk of election, or ~~constable~~ county clerk engaged in the performance of election duties ~~as required by this act~~.

~~(f) Election register. The "election register" means the voter registration cards of all electors who are qualified to appear and vote at the designated polling places.~~

~~(g) Combination election record and poll book. "Combination election record and poll book" is the book containing a listing of registered electors who are qualified to appear and vote at the designated polling places.~~

~~(h) Tally book. The "tally book" or "tally list" means the forms in which the votes cast for any candidate or special question are counted and totaled at the polling precinct.~~

...

50-403. SUPERVISION OF ADMINISTRATION OF ELECTION LAWS BY ~~CITY~~ COUNTY CLERK. For e~~E~~ach city ~~clerk~~, the county clerk of the county is the chief elections officer and shall exercise general supervision of the administration of the election laws in ~~his~~ the city for the purpose of achieving and maintaining a maximum degree of correctness, impartiality, efficiency and uniformity. The ~~city~~ county clerk shall meet with and issue

...

SECTION 103. That Sections 50-404, 50-405, 50-406, 50-407, 50-408, 50-409, 50-410, 50-411 and 50-412, Idaho Code, be, and the same are hereby repealed.

...

50-~~41~~04. REGISTRATION OF ELECTORS. All electors must register before being able to vote at any municipal election. The county clerk shall be the registrar for all city elections and shall conduct voter registration for each city pursuant to the provisions of ~~section 34-1402~~ chapter 4, title 34, Idaho Code. To be eligible to register to vote in city elections, a person shall be at least eighteen (18) years of age, a citizen of the United States and a resident of the city for at least thirty (30) days next preceding the election at which he desires to vote, or a resident of an area annexed by a city pursuant to the provisions of chapter 2, title 50, Idaho Code.

SECTION 105. That Sections 50-415, 50-427 and 50-428, Idaho Code, be, and the same are hereby repealed.

...

(4) Pursuant to section 34-1401, Idaho Code, all municipal elections shall be conducted by the county clerk of the county wherein the city lies, and elections shall be administered in accordance with the provisions of title 34, Idaho Code, except as those provisions are specifically modified by the provisions of this chapter. After an election has been ordered, all expenses associated with conducting municipal general and special elections shall be paid from the county election fund as provided by section 34-1411, Idaho Code. Expenses associated with conducting runoff elections shall be paid by the city adopting runoff elections pursuant to the provisions of section 50-612 or 50-707B, Idaho Code, or both.

...

50-~~46~~712. CANVASSING VOTES -- DETERMINING RESULTS OF ELECTION. The ~~mayor and the council~~ county commissioners, within ~~six (6)~~ ten (10) days following any election, shall meet for the purpose of canvassing the results of the election. Upon acceptance of tabulation of votes prepared by the election judges and clerks, and the canvass as herein provided, the results of both shall be entered in the minutes of city council proceedings and proclaimed as final. Results of election shall be determined as follows: in the case of a single office to be filled, the candidate with the highest number of votes shall be declared elected; in the case where more than one (1) office is to be filled, that number of candidates receiving the highest number of votes, equal to the number of offices to be filled, shall be declared elected.

The effort to support the inappropriate delegation extended so far that Kennedy's counsel prepared an affidavit for Mr. Hurst in which he characterized "the most significant election reform bill of the past several decades"[278] as "some changes in wording."[279] The contract between the City and County violates the essential requirements of the 1993 law[280] and is void. In addressing Ada County's attempt to enter into a contract that would change a zoning ordinance, the Court held the county commissioners did not have the authority, and the agreement and actions under it are void.[281]

ARGUMENT

9. The district court erred in dismissing the claim seeking to set aside the entire 2009 General Election and only retaining the claim to set aside the election for Seat 2.

This presents a question of law, over which the Court exercises free review, a question of an abuse of discretion, and a question of statutory interpretation.

From Brannon's perspective the election contest always has been a challenge to the untrustworthy conduct of the 2009 election. As the Court in Henley v. Elmore County[282] stated:

> A contested election, whatever the form of the proceeding may be, is in itself a proceeding in which the people—the constituency—are primarily and principally interested. It is not a suit for the adjudication and settlement of private rights.

Respondents defense approach caused the presiding judges to view the case to only be about which candidate won the Seat 2 race. The City's position always has been that "the City was

[278] Defendants' Exhibit G, p. 8.
[279] R. p. 989.
[280] Which actions are set forth in the facts and argument below.
[281] *Ada County, by Bd. of County Com'rs v. Walter, 96 Idaho 630, 632, 533 P.2d 1199 (1975).*
[282] *Henley v. Elmore County, 72 Idaho 374, 381-282, 242 P. 2d 855 (1952)*

not part of this election" and it didn't want to be bothered.[283] The discussion leading up to the district court's requiring a $40,000.00 cost bond is illustrative.

> Mr. Kelso:..Anything beyond [a $500.00 bond] would be overly burdensome to Mr. Brannon...[it would be] essentially taking a very fundamental constitutional right away from a person to challenge an election by imposing an egregious number as a bond...
> The Court: This is a cause of action between your client and Mr. Kennedy.
> Mr. Kelso:..Still the fundamental issue in any election contest is the interest of the public.
> The Court: I understand what you are saying but—I am going to require posting a bond in the amount of $40,000.[284]

The district court (J. Simpson) dismissed all claims against the Municipality, mayor, City Clerk, and council members but retained Kennedy as a party, contesting Seat 2.[285] Brannon sought reconsideration of this dismissal and argued that the district court's decision on the statute, because of the sweeping dismissal, acted as a *sub silentio* dismissal of the entire election contest. The motion was heard by J. Hosack because J. Simpson had withdrawn.

The Amended Complaint alleged "acts or failures to act,"[286] on the part of the City and City Clerk based upon twelve detailed paragraphs of specific allegations,[287] and the Complaint asserted that such actions constitute such malconduct that the election should be set aside, voided, and or annulled all or in part.[288]

The Prayer for Relief seeks Judgment declaring that the entire 2009 City of Coeur d'Alene municipal election be set aside, void, and annulled in total."[289] The fact that Brannon was the only candidate that had the conviction to seek to ensure that democracy was being

[283] May 14, 2010 Hearing Tr. p. 39, l. 16-17.
[284] March 2, 2010 Hearing Tr. p.67-68.
[285] March 2, 2010 Hearing Tr. p. 63, l. 24-25, p. 64, l. 1-4. R. p. 793.
[286] R. p. 84.
[287] R. p. 85-89.
[288] R. p. 89.
[289] R. p. 91. Paragraph 2 sought Judgment declaring the 2009 City of Coeur d'Alene municipal election for Seat 2 is set aside, void, and annulled.

protected did not affect his standing under I.C. §§ 50-406 (1) and (3) to contest the entire election.[290] Brannon is a resident of the City, was a council candidate, and is an "aggrieved" and "adversely affected" person. These words are not defined in Title 50 Chapter 4, but it would produce an absurd result to hold he did not have a sufficient interest to challenge the election. I.C. §§ 50-406 (person) and 34-2007 (elector) provide that persons adversely affected may contest an election.

When the district court (J. Simpson) granted the City's Motion to Dismiss, it dismissed the Amended Complaint against the City defendants without addressing the other claims despite stating:

> "I find that the plaintiff has met the requirements of pleading under 34, chapter 20...I think it is clearly an election contest."[291]

The district court, as evidenced by its order setting the cost bond at $40,000.00, did not want the election contest to continue.[292] It is *a fortiori* that no person running for a Coeur d'Alene city council seat that pays $750 per month[293] would post a $40,000.00 cost bond to seek to prove an election was fatally flawed.

On the motion to reconsider their dismissal, Judge Hosack also held the City could contract with the County, but he brought the City and City Clerk back into the election contest only as "nominal parties"[294] stating, "I don't really know what difference it makes."[295] J. Hosack didn't bring the City and City Clerk back into the election contest to defend its city election. It was, after all, the City's election and its responsibility to conduct it.

---

[290] The district court never held Brannon did not have standing to contest the entire election.
[291] March 2, 2010 Hearing Tr. p. 63, l. 6-9.
[292] Brannon just wanted the City to concede the absentee ballot numbers discrepancy and hold another election. The May 2010 primary election date would have been an appropriate time to hold the new election.
[293] Coeur d'Alene Ordinance 3305 § 1, 2007.
[294] May 14, 2010 Hearing Tr. p. 45, l. 1.
[295] May 14, 2010 Hearing Tr. p. 45, l. 10-11.

The district court (J. Hosack) stated that it didn't see anything in the amended complaint that talks about any office other than Seat 2.[296] The filed amended complaint however, based upon the failures in the conduct of the election and Brannon's status as an aggrieved person under I. C. § 50-406, sought the entire election set aside.[297]

The district court was advised the Amended Complaint contained allegations of malconduct that were "quite detailed."[298] The district court viewed the contest as merely addressing illegal votes counted. The malconduct claim was treated as being one in the same as an I.C. § 34-2001 (5) claim of "illegal votes received." The court reaffirmed the dismissal of the claim seeking a new election on all races by erroneously going outside the pleadings[299] and proceeded, without any evidentiary record, to enter a finding:

> "...but even if it [malconduct] has been alleged, it isn't sufficient to change the result.[300]

The district court erred in dismissing the malconduct claim, the claim to set aside the entire election, and failed to exercise his discretion in a manner consistent with legal standards for determining of motions to dismiss and reconsideration.[301]

ARGUMENT

10. The district court erred in refusing to consider the the affidavit submitted and denying the motion for a new trial or amended judgment.

The Court exercises free review over the district court's failure to comply with procedural rules.[302]

---

[296] May 14, 2010 Hearing Tr. p. 9, l. 13-25.
[297] R. P. 86, paragraphs 22, 23.
[298] May 14, 2010 Hearing Tr. p. 42, l. 23-25, p. 43, l. 1-11.
[299] *Owsley v. Idaho Industrial Commission, 141 Idaho 129, 106 P. 3d 455 (2005).*
[300] May 14, 2010 Hearing Tr. p. 47, l. 14-17.
[301] *Blanc v. State, 36294, 36295 (IDCCA); State v. Hedger, 115 Idaho 598, 768 P. 2d 1331 (1989).*
[302] *Ernest v. Hemenway and Moser, Co., Inc., 120 Idaho 941, 821 P. 2d 996 (1991).*

Brannon's motion for a new trial was based upon IRCP Rule 59 (a) (6) and (7). These grounds for a new trial, while not specifically requiring an affidavit to be filed in support, do not require that an affidavit submitted in support of the motion must not be considered Neither the City nor Kennedy objected to the affidavit. The purpose of an affidavit in support of a motion for a new trial is to give notice of facts previously unknown to the trial court which support the motion.[303] That was the purpose of the affidavit submitted to the district court.

The district court utilized its own interpretation of Marano's testimony, unsupported by any competent evidence, to find, despite Marano's official count which was undertaken so that there would be no question as to the number of envelopes, that 2051 envelopes existed in a "stack". The County conceded that at the official count of City envelopes Marano was given four envelopes that "for some reason"[304] could not be determined whether or not they were City election envelopes. This discrepancy of four envelopes, and thus ballots, that the County couldn't tell if they were City envelopes, is sufficient to change the result of the election. Despite Marano's official count, the district court accepted Phillips testimony *that at some "unknown date,"*[305] *after Marano's count*, that '*it was determined*' by someone without any explanation of the basis therefor, that 32 of the envelopes given to Marano as City envelopes, were actually County envelopes. Without any evidence, or even an assertion, the district court found that one envelope must have been lost. By deducting four unknown envelopes and deducting the other 32 envelopes determined at some time by someone after Marano's count to be County envelopes, from the 2086 counted by Marano the district court

[303] *Ernest v. Hemenway and Moser, Co. Inc., 120 Idaho 941, 821 P. 2d 996 (1991).*
[304] R. p. 2288.
[305] Tr. p. 594, l. 6-15.

arrived at 2050 City envelopes. Since even that total didn't match the 2051 machine counted ballots the district court, without any evidence or suggestion by the County, found that one envelope had been lost and thus there were really 2051 absentee envelopes and ballots in existence.[306] The memorandum decision refers to a "stack" of envelopes on several occasions, even though the no envelopes were introduced. Brannon didn't offer the envelopes because Marano's official count was held to eliminate any questions about the number of envelopes and ballots.

All of the envelopes provided to the district court with the affidavit, were marked "Voided."[307] The envelopes with the affidavit are City election returned absentee ballot envelopes for the 2009 election. The district court's finding that there were 2050 valid envelopes in existence (with one lost) *could not possibly* be correct. The absentee ballot return envelopes were submitted to the district court to show that it's calculation used to reach a <u>total</u> of 2051 absentee ballot return envelopes, *could not possibly* be correct.

It was error for the district court to refuse to consider the affidavit and it was error for the district court to not grant the requested new trial or to amend its decision and judgment to hold that sufficient evidence had been introduced to contest the election and to set it aside.

CONCLUSION

The Idaho Municipal Election Law's essential election safeguards were knowingly disregarded by election workers. The single most important record necessary to ensure an accurate count, the absentee ballot record, was knowingly not prepared when the polls closed. No pre-count verification of valid absentee ballots returned was conducted. Chief Deputy Secretary of State Hurst described the failure to prepare the statutorily required absentee

[306] R. p. 2288.
[307] R. p. 2364-2368.

ballot record at the close of the polls as a breach of duty. The first absentee ballot record clearly revealed a ten vote discrepancy. Election workers were aware of this discrepancy but ignored it. The failure to address it stripped the election of any validity. While the state database may not be *necessarily* accurate, the November 6th absentee ballot record *is accurate*. County Clerk English confirmed that the November 6th absentee ballot record was a complete record of the names of all absentee voters who returned ballots. Chief Deputy Hurst's investigation of the *entire* state database verified that it, *possibly*, could only be off by four persons. If it is assumed that all of these four persons voted by absentee ballot the total number of non-voided absentee ballots returned is six (6) fewer than were counted by machine. Mr. Hurst testified that the November 6th absentee ballot record was the "*only evidence*" of the number of absentee ballots.

Election workers failed to inform the mayor and council of the ballot discrepancy before they "rubber stamped" an incorrect election result. The minutes of the election 'canvass' fail to even accurately document what occurred. This is an exclamation point at the end of this haphazardly run election. The district court's gratuitous comment that the election was well run, is not even remotely supported by the record. It appears to have been an attempt to sway public perception against such a vile attack on American democratic process.

The City's total delegation of its election duties, in violation of the laws in effect since 1993, led to numerous fundamental errs. The County carelessly used UOCAVA application forms to send out City absentee ballots to anyone who had in other election years had requested county or federal election ballots. Absentee ballots were automatically sent to non-city residents who had not requested them. Residences were not verified. The statutory limitation that only City residents may legally vote in a city election was ridiculed by media

and illegal voters alike. At least five non-city residents were sent and returned illegal absentee ballots. The district court acknowledged that 'residence' under municipal law was different than under state and county law, but was 'uncomfortable' holding that residency requirements were different depending on whether it was a city or a count/state/federal election. As a result it held that a *permanent resident of Canada* who had not resided in the City since 1988 and four other non-city residents were legal voters in the City's election.

After the election duties were delegated to the County, the mayor and council believed that it was no longer 'their' election but rather it was the County's election. They believed that when the County delivered a vote tally it was their obligation to "rubber stamp" it. They removed themselves from any investigation of election issues. The County's election supervisor believed the resolution of all election issues was her sole responsibility. In her discretion she ignored 'technical disqualifications' and allowed all votes.

The election process collapsed to a degree that would change the election result. The single most appeal determinative error by the district court, after its refusal to grant the motion to disqualify, was its failure to deduct the "Voided" absentee ballots returned from the number of valid absentee ballots returned. Had it completed its computation and deducted the "Voided" ballots it would have had to set aside the election. The district court's finding that a total of 2051 absentee envelopes, each containing one valid absentee ballot, were returned and thus the machine count of 2051 absentee ballots was correct, is not supported by *any* evidence. When the six (6) absentee ballots that were returned and "Voided" are deducted from the total returned, no sorcery can mathematically establish the existence of 2051 *valid* absentee ballots to be counted. The fact that six (6) more absentee ballots were counted than

non-voided ballots existed, under any interpretation of the evidence, is sufficient error to change the result of a three (3) vote race.

Properly conducted and accurate elections are the cornerstone of any democracy. Elections are the most significant means by which Idaho's diverse citizenry avoids social discord. Without verifiable elections democracy will inevitably fall victim to power and corruption. The decision should be reversed and remanded with directions to set aside the election and order a new election held.

Respectfully submitted this ____day of September, 2011.

_____
Starr Kelso, Attorney for Appellant Brannon

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

Respondent Kennedy's attorneys:
Peter C. Erbland
P. O. Box E
Coeur d'Alene, Idaho 83816

Scott W. Reed
P.O. Box A
Coeur d'Alene, Idaho 83816

and

Respondents City/City Clerk's attorney:
Michael L. Haman
P.O. Box 2155
Coeur d'Alene, Idaho 83816

on the ____ day of September, 2011, by sending the same in an envelope by United States Mail, postage prepaid thereon.

_____
Starr Kelso