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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JIM BRANNON, **Plaintiff,** **Vs.** **SUSAN K. WEATHERS, in her capacity as the City of Coeur d'Alene City Clerk; MIKE KENNEDY, in his capacity as the incumbent candidate for the City of Coeur d'Alene Council Seat #2,** **Defendants.**	**Case No. CV-09-10010** **BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANT MIKE KENNEDY**

A. PRIOR PROCEEDINGS

At the hearing on June 14, 2010, this Court disposed of all motions and requests then pending. The Court set August 31, 2010 at 3:00 p.m. for any further hearing with the explicit understanding that any party could file a motion for summary judgment to be

heard upon that date. If such a motion were filed, briefed and argued on August 31st, this Court would make a decision prior to trial set to commence September 14, 2010.

Plaintiff has had the opportunity with the cooperation of Kootenai County and under the supervision of Magistrate Eugene Marano to examine the absentee ballot return envelopes. Plaintiff has provided discovery as sought by defendants City of Coeur d'Alene and Mike Kennedy.

Plaintiff has filed an affidavit by William L. McCrory related to the inspection of the absentee ballot return envelopes. In response, defendant Kennedy is filing the affidavit of Deedie Beard related to the McCrory affidavit and a Motion to Strike the McCrory affidavit.

The McCrory affidavit and issues concerning absentee ballots do not create any material facts related to summary judgment. It is not possible to know for whom any of the absentee ballots were cast.

At the time the City's motion to dismiss was argued on June 14th, the Court noted that it would not give any consideration to any of the affidavits that had been filed thereby declining to convert the motion to dismiss into a motion for summary judgment.

At this time, defendant Kennedy is filing a motion for summary judgment with the understanding that the entire record in this case is available for consideration by the Court.

B. SUMMARY JUDGMENT STANDARDS

The standard for a Rule 56 motion in a court only trial by only the court without a jury was very recently set forth in *Flying Elk Investment, LLC v. Cornwall,* 10.9 ISCR 55 ____Idaho, _____, _____ P.3d_____, (April 26, 2010):

> **The district court did not weigh the evidence, but correctly settled conflicting inferences given the slim record. Where both parties decline a jury trial, the district court may draw the most probable inferences from the uncontroverted facts, even if such inferences are adverse to the non-moving party. *Vreeken v. Lockwood Eng 'g, B.V.,* 148 Idaho 89, ---, 218 P.3 1150, 1162 (2009) (citing *Chapin v. Linden,* 144 Idaho 393, 396, 162 P.3d**

10.9 ISCR at 60.

C. PART I: SUMMARY JUDGMENT ON AMENDED COMPLAINT

The issue is whether the Amended Complaint filed December 10, 2009 and never subsequently sought to be amended states any cognizable cause of action upon which there are genuine issues as to any material facts. Rule 56 (c), I.R.Civ.P.

By prior rulings of two district judges, this Court has already dismissed the only two causes of action set forth in the amended complaint. Counsel for plaintiff has simply refused to accept the Court ordered dismissal or to seek to amend to create a new cause of action or even to state a legal theory based upon Title 34.

Plaintiff seeks to proceed to trial on this Amended Complaint as if the Court had not decided anything. These are the allegations constituting plaintiff's causes of action and the Court's rulings:

1. Amended Complaint alleges that the election was required to be conducted under Title 50, Chapter 4 of the Idaho Code. Paragraphs2, 3, 8, 9, 10, 17, 18, 19, 20, 21 (a) (b) (c) (d) (e) (f) (g) (h) (i) (j) (k) (l) (m), 22, 23, 24, 25 (l), 26, 27, 28, 29 and 30.

Court Ruling. Conduct of the city election was governed by Chapters in Title 34, not Title 50, Chaper 4.

2. Amended Complaint alleges that delegation of conduct of this election by the City of Coeur d'Alene to Kootenai County was illegal. Paragraphs 11, 12, 13, 14, 15, 16, 17, 19, 23, 25 (a) (g) (h) (l).

Court Ruling. Delegation was legal and proper.

3. Amended Complaint named City of Coeur d'Alene, mayor and six council members as principal defendants along with Mike Kennedy as incumbent candidate.

Court Ruling. Order to Dismiss of Judge Benjamin Simpson dismissed City, mayor, clerk and all six council members on March 3, 2010. Judge Hosack on May 23, 2010 reinstated the City of Coeur d'Alene and City Clerk Susan K. Weathers as defendants for the limited purpose of ordering a new election if the Court determined that the November 3rd city election should be set aside, voided or annulled.

The rulings did not state that the City and the city clerk were reinstated as culpable defendants. As set forth in the prior rulings, the City and clerk are not subject to any liability related to the November 3, 2009 election.

Plaintiff did not move to amend his complaint to claim violations under Title 34 nor to recognize the delegation nor to add as defendants Kootenai County which would have been responsible for any violations.

Plaintiff made no attempt at amendment even though his claims related to Title 50 and delegation would have been preserved in the event of an appeal.

In *Winn v. Campbell,* 145 Idaho 721, 184 P.3d 352 (2008), the Idaho Supreme Court affirmed summary judgment for defendant in a case where plaintiff had named the wrong defendant and attempted to amend after the applicable statute of limitations had run. Plaintiff was bound by her pleadings. 143 Idaho at 729 – 730.

Title 34 governing election contests in §34-2106 states that notice of an election contest must be filed within 20 days after the election. Any effort by plaintiff to amend at this point eight months after November 3rd, 2010 would be barred under the reasoning in *Winn v. Campbell.*

Although Mike Kennedy is a proper defendant as incumbent (Idaho Code §34-2008, and §34-2009), he is not alleged in the Amended Complaint to have violated any election laws. The Plaintiff has the total burden of proving that the election laws were substantially violated and that the violations would change the outcome of the election. After the orders entered by both judges, there is not a defendant in this case who is alleged to have violated any election law.

In any election contest, the complaint would make as a defendant a government entity and/or its employees alleged to have committed election violations which in fact resulted in a change in actual vote count sufficient to change the outcome. The record

in this case is based on the rulings of this Court establish as a matter of law that defendant City of Coeur d'Alene, mayor, clerk and council members did not conduct the election and that plaintiff's legal theory of violation of the municipal election law, Title 50, Chapter 4, was not applicable to the November 3, 2009 city election. Further, the action of the City in delegating the election conduct to Kootenai County as an independent contractor was legal, not illegal, as alleged in the Amended Complaint.

Part 1 can be summarized: wrong defendant: wrong law and unsupportable allegation of illegal delegation. Summary judgment against plaintiff must be given and the case as against Mike Kennedy and nominal defendants City of Coeur d'Alene and city clerk must be dismissed with prejudice.

D. PART II, SUMMARY JUDGMENT ON TITLE 34.

As set forth above and shown in the voluminous pleadings, counsel for plaintiff has refused to recognize the rulings of this Court as binding in this case. The Court, not previously presented with a summary judgment motion, has declined the opportunity to dismiss the case.

Indeed the discourse before both judges has reflected the willingness of the Court to treat the plaintiff as if he had properly pled Title 34. Judge Simpson directed plaintiff to post a bond under Idaho Code §34-2008. Judge Hosack has applied Idaho Code §34-2001, Grounds of Contest, eliminating subparagraph 1, but allowing the case to proceed under subparagraphs 5, illegal votes, and 6, error in counting votes.

Title 34, Chapter 20 should not be applied for reasons stated in Part 1. However, defendant Kennedy will respond further as if Idaho Code §34-2001 (5) and (6), applied.

However, the Court must apply the interpretations given by the Idaho Supreme Court in opinions on summary judgment decisions by district judges: In *Berg v. Fairman*, 107 Idaho 441, 690 P.2d 896 (1984), the Idaho Supreme Court affirmed summary judgment entered in favor of plaintiff with this observation:

> **Again, we emphasize that the purpose of summary judgment proceedings is to eliminate the necessity of trial where facts are not in dispute and where existent and undisputed facts lead to a conclusion of law which is certain. *Bandelin v. Pietsch,* 98 Idaho 337, 563 P.2d 395 (1977), *cert. denied,* 434 U.S. 891, 98 S.Ct. 266, 54 L.Ed2d 177 (1977); *Jacobsen v.State,* 889 Wash.2d 104, 569 P.2d 1152 (1977); see *Hackin v. Rupp*, 9 Ariz. App. 354, 452 P.2d 519 (1969). If a party resists summary judgment, it is his responsibility to place in the record before the trial court the existence of controverted material facts which require resolution by trial. A party may not rely on his pleadings nor merely assert that there are some facts which might or will support his legal theory, but rather he must establish the existence of those facts by deposition, affidavit, or otherwise. Failure to so establish the existence of controverted material facts exposes a party to the risk of a summary judgment. We hold that such is the case here.**
>
> 107 Idaho at 444.

A similar conclusion of affirmation and this similar holding is in *Department of Agriculture v. Curry Bean Co., Inc.*, 139 Idaho 789, 86 P.2d 503 (2004):

> **On review of a grant of summary judgment, this Court "liberally construes the record in the light most favorable to the party opposing the motion, drawing all inferences and conclusions in that party's favor, and if reasonable people could reach different conclusions or draw conflicting inferences then an order granting summary judgment must be reversed." *Zimmerman v. Volkswagen of America, Inc.,* 128 Idaho 851, 854, 920 P.2d 67,70 (1996). However, "[I]t is axiomatic that upon a motion for summary judgment the non-moving party may not rely upon its pleadings, but must**

come forward with evidence by way of affidavit or otherwise which contradicts the evidence submitted by the moving party, and which establishes the existence of a material issue of dispute fact." *Zehm v. Associated Logging Contractors, Inc.,* 116 Idaho 349, 350, 775 P.2d 1191, 1192 (1988).

139 Idaho at 792.

This Kennedy motion for summary judgment is supported by eight (8) affidavits:

December 22, 2009

Affidavit of Deedie Beard in support of summary judgment. Recital of conduct of election as a rebuttal to accusations in Amended Complaint, paragraphs 12, 14, 17, 18, 19, 23, 24 and 25 (a) (b) (c) (d) (e) (f) (g) and (h).

December 22, 2009

Affidavit of Deedie Beard in support of summary judgment upon absentee voting records.

December 22, 2009

Affidavit of Dan English in support of summary judgment asserting validity of four challenged out-of-country absentee voters.

January 14, 2010

Second affidavit of Dan English in support of summary judgment. Reciting contacts prior to lawsuit with Brannon and representatives.

January 14, 2010

Second affidavit of Deedie Beard reciting contacts prior to lawsuit with Brannon and representatives.

January 14, 2010

Affidavit of Chief Deputy Secretary of State Timothy A. Hurst reciting Secretary of State practices and supporting delegation of elections with attached letter dated December , 2009 affirming legality of absentee votes of Timmy Farkes, Monica Paquin, Gregory Proft and Alan Friend.

March 10, 2010

Affidavit of Dan English for clarification describing absentee ballot practices.

June 6, 2010

Affidavit of Donald Boehm describing his supervision of opening absentee ballots on election day.

July 28, 2010

Affidavit of Deedie Beard describing county conduct regarding absentee voter ballots.

Aside from multiple affidavits by attorney Starr Kelso who was not a percipient witness to anything, there are only two affidavits of record filed on behalf of plaintiff:

January 24, 2010.

Affidavit of Gregory A. Proft describing his absentee voting conducting and identifying his vote as being for Jim Brannon.

(If the argument of plaintiff that Proft is illegal is accepted, then one vote must be deducted from Brannon's total and Kennedy wins by six votes.)

July 9, 2010.

Affidavit of William L. McCrory regarding his observations with copies of some absentee ballots. Since it cannot be determined for which candidate any absentee ballot was cast, there is no issue of material fact.

In paragraph 25 (d), the Amended Complaint alleges that Tammy Farkes, Monica Paquin, Gregory Proft and Alan Friend, all residing out of the United States, cast illegal votes. As of this date the affidavit of Gregory Proft's states he voted for Jim Brannon. It is not known for whom the other three voted.

Paragraph 25 (j) alleges that Rahana Zellars was not a resident of Coeur d'Alene but voted in the city election. It is not known for whom she voted.

There is in paragraph 25 (l) an allegation of additional illegal votes without identification of the names of any such. Since filing of the Amended Complaint, counsel for plaintiff took the depositions of Ronald Prior and Susan Harris, husband and wife, alleged to have voted without having resided more than 30 days within the city. Both testified under oath that they could not remember for whom they voted as council member from Precinct 2 or if they had voted for either in that slot.

Counsel for plaintiff noticed up and then cancelled the deposition of Dustin Ainsworth, an alleged illegal voter. In answers to interrogatories, plaintiff named 12 persons who allegedly made some illegal action that would have nullified their absentee vote. It is not possible to know for whom any of those named voted, absentee voter envelopes being opened and the ballot cast without connecting any ballot to the envelope from which it came.

There is one person identified in the interrogatory as Kimberly Gagnon who cast an absentee ballot that plaintiff questions, but there is no indicating in the record as to what may have been invalid or for whom Gagnon voted.

The answers to interrogatories identify a number of precincts and names of voters in those precincts who are questionable, but these are all under the introductory sentence: "persons for whom it cannot be determined which ballot they received to vote. "In other words, they were in consolidated precincts and could have voted only on the bond election in Kootenai County, not in the city election.

As is known from the depositions of Prior and Harris taken January 29, 2010, plaintiff has retained a private investigation service to search for illegal voters who voted for Kennedy. There is no evidence in the record of any such illegal voter to have been counted for Kennedy.

Any affidavit that may be submitted after this date from any investigator identifying an alleged illegal voter as having voted for Kennedy would be inadmissible as hearsay.

Counsel for plaintiff has on numerous occasions in pleadings submitted, and in open court, asserted intentions to take the depositions in Canada of Farkes, Paquin and Friend. Six months have passed and no such depositions have been proposed.

In any event, the absentee votes of Farkes, Paquin and Friend were legal. Defendant Kennedy will include in hearing on August 31, 2010 his Motion in Limine and Brief in Support dated March 22, 2010.

The Amended Complaint is replete with the charges that the election was void because of irregularities in absentee votes. The vote count made under supervision of Magistrate Marano established that the absentee vote count of 2051 ballots as reported to the city council by Kootenai County was exactly correct.

The three affidavits of Deedie Beard who had detailed knowledge, confirmed that all county conduct with regard to absentee ballots and all of the inspections of voting were entirely proper.

In any event, the allegations of irregularity in Paragraphs 13, 14, 17, 19 and 25 (b) (c) (d) (e) (f) (g) (h) (k) and (l) fail to state any grounds for setting aside the election. This rejection of plaintiff's argument was clearly set forth in *Noble v. Ada County Election Board*, 135 Idaho 495, 20 P.3d 679 (2004) in rejectioning the contention of plaintiff's counsel for that case, now counsel in this case, that 189 absentee ballots improperly dated or marked made the election illegal:

> **It was acknowledged by the clerk of the District Court that 189 of the absentee ballot return envelopes were not stamped with both the date and time of receipt by his office and that none of the envelopes indicating "hand delivery" were marked with the name of the person delivering them. After considering this testimony, the district judge ruled that the procedural errors of the clerk's office could not be used to disenfranchise 189 electors.**
>
> **The conclusion of the district court is correct. This Court has previously held that "the right of a person having the constitutional qualifications of a voter cannot be impaired, either by the legislature or the malfeasance or misfeasance of a ministerial officer." *Jaycox,* 39 Idaho at 86, 226 P. at 287 (quoting *Earl v. Lewis*, 28 Utah 116, 77 P. 235, 238 (1904). Although the original statement related to registration requirements, we find it equally applicable in the current context. The votes that Noble urges this Court to declare illegal are the votes of 189 constitutionally qualified electors. These electors took the time to register, request absentee ballots, vote, and**

then return those ballots. There was no evidence that any of these ballots were cast after the polls had closed, nor that there was anything improper about the votes themselves. This Court cannot agree with Noble that the intent of the legislature was to disenfranchise these electors.

138 Idaho at 501 – 502.

Defendant Kennedy is submitting with this motion for summary judgment a copy of the Findings of Fact, Conclusions of Law and Order entered by Ada County District Judge Carl B. Kerrick on August 24, 2000 in *Noble v. Ada County Elections Board.*

Judge Kerrrick summarizes the testimony of witnesses called by plaintiff Noble which included the equivalent of most of the persons submitting affidavits in support of summary judgment in this case - Ilene Goff, election supervisor, Juneta Spencer, election employee and, J. David Navarro, county clerk.

Plaintiff Noble utilized an expert witness. Plaintiff Brandon has not identified any expert and it is too late in this case to come up with one.

Using an expedited hearing, the *Noble* case went to trial 64 days after Noble commenced his case. After Noble had rested his case, neither Ada County nor James Risch presented any testimony. 135 Idaho at 498.

What is being put forth in Kennedy's motion for summary judgment is the functional equivalent of the Ada County trial. All of the knowledgeable persons who conducted the election for Kootenai County have submitted detailed affidavits. Plaintiff has not chosen to depose any of these affiants. Plaintiff has filed nothing contradictory to any of what Dan English, Deedie Beard, Timothy Hurst, or Donald Boehm have set forth.

William L. McCrory has filed an affidavit questioning absentee ballots. Everything in that affidavit including all exhibits is hearsay. The personal opinions of William L. McCrory do not meet the standard for expert testimony. There is no way to know for whom any absentee ballot was cast.

One of Judge Kerrick's conclusion disposed of the plaintiff Noble's allegation of irregularities and is ever more forceful here where there are no identified irregularities:

> **19. It should be noted that in listening to testimony and reviewing election records the Court was impressed with the enormity of the task of conducting an election. All witnesses who testified relative to their involvement in the election appeared to be committed to the task and used good faith effort in attempting to comply with all election law requirements. It is difficult for the Court to imagine an election where no mistakes are made. It does not appear to be possible given the task. Having heard and reviewed the evidence, the reasoning of the Idaho Supreme Court in *Jaycox* even though a 1924 case, appears to be sound.**

CONCLUSION

PART I

Plaintiff Brannon's Amended Complaint and all of his pleadings thereafter down to and including the affidavit of William L. McCrory rely entirely upon Title 50, Chapter 4.(1) This Court has held that Title 50 does not apply. The Amended Complaint

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1 McCrory Affidavit, July 9, 2010.

> **4. That I have read, and understand, the requirements set forth in Idaho Code sections 50-446 and 50-447 in effect at the time of the 2009 City of Coeur d'Alene General Election.**
>
> **5. During my July 7, 2010 examination of the absentee ballot return envelopes I identified Eight Hundred Seventy Seven (877) absentee ballot return envelopes with anomalies reflecting that they did not comply with Idaho Code sections 50-446 and 50-447 and/or had some other types of anomalies such as a "whited out" signature.**

alleges that the City of Coeur d'Alene, which did not conduct the elections, violated the election laws. This Court has held that delegation to the county was legal and proper, but counsel for plaintiff continues to charge the City, not the county, as the proper defendant.

Plaintiff is bound by his pleadings. Judgment of dismissal with prejudice must therefore be entered. Trial cannot be held on a complaint that is founded upon the wrong law, names the wrong defendant and states grounds, e.g., illegal delegation, that do not exist, all issues already decided against them in this case.

PART II

As a matter of law, none of the allegations in the plaintiff's Amended Complaint filed December 10, 2009 supported the objective in said complaint to ". . .set aside, void, annul all or part, City of Coeur d'Alene November 3, 2009 General Election." Under either Title 50, Chapter 4 or any part of Title 34, the voters named in the Amended Complaint were all legal voters. Plaintiff did not in December of 2008, nor in the eight (8) months since present any credible evidence as to for whom any of these named voters cast ballots for council position No. 2 in said city election.

In an opinion issued July 1, 2010, *Mortenson v. Stewart Title Company,* 10.14 ISCR 104, the Idaho Supreme Court reaffirmed its prior rulings in other cases that construing of a motion for summary judgment as favorable to the non-moving party disappears when the motion is supported by evidence in the records:

> **However, when the moving party provides evidentiary support for its motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of that party's pleadings." I.R.C.P. 56 (e).**

Defendants are entitled to summary judgment of dismissal with prejudice of plaintiff's Amended Complaint and all related pleadings. Plaintiff should also be required to pay all attorney's fees and costs pursuant to Idaho Code §12-121, Rule 54 (d) and Rule 11 (a) (1) I.R.Civ.P.

Respectfully submitted, this 2nd day of August, 2010.

Scott W. Reed
Attorney for Defendant
Mike Kennedy

CERTIFICATE OF SERVICE

I certify that a true copy of the above and foregoing was served by first class mail, this 2nd day of August, 2010 to:

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