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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,	**Case No. CV-09-10010**
Plaintiff,	
Vs.	
CITY OF COEUR D'ALENE, IDAHO, a municipal corporation; 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; LOREN RON EDINGER, DEANNA GOODLANDER, MIKE KENNEDY, A.J. AL HASSELL III, WOODY McEVERS, and JOHN BRUNING in their Capacities as Members of the City Council of the City of Coeur d'Alene; SANDI BLOEM, in her capacity as Mayor of the City of Coeur d'Alene; and JANE AND JOHN DOES A THROUGH Z whose true and correct names are unknown,	**BRIEF OF INCUMBENT CANDIDATE MIKE KENNEDY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
Defendants.	

The Amended Complaint of plaintiff Jim Brannon in 18 pages plus exhibits totally and completely fails to state any cause of action as against any named defendant. From the facts presented, indeed including the documents attached as exhibits, the Court will find that the case was brought frivolously, unreasonably and without foundation.

Neither counsel for the plaintiff nor the plaintiff himself has made reasonable inquiry into either the facts or the law.

The original and amended complaint have been a pleading abuse not made in good faith and constituting unacceptable harassment to all named defendants in general and to incumbent candidate defendant Mike Kennedy in particular.

In his capacity as defendant incumbent candidate, Mike Kennedy is moving for summary judgment pursuant to Rule 56, I.R.Civ.P. upon five separate grounds upon which there are no genuine issues as to any material fact:

1. The City of Coeur d'Alene lawfully delegated conduct of the November 3, 2009 city election to Kootenai County.
2. Neither the city election in general nor the election for Council Position No. 2 can be set aside, voided or annulled.
3. Only one of the alleged election violations involving one voter not registered in the city occurred. There were no other violations of city, county, state or federal laws and regulations applicable in the November 3, 2009 city election.

4. As set forth in the affidavit of County Election Manager Deedie Beard filed herewith, every action done by Kootenai County under the contract to perform as chief election official for the City of Coeur d'Alene was in total and complete compliance with all applicable federal, state and local election laws and regulations.

5. Plaintiff Brannon cannot at time of trial carry the burden of proof which requires testimony of all five named "illegal"voters to testify that each voted for Mike Kennedy.

I. DELEGATION BY THE CITY TO KOOTENAI COUNTY TO CONDUCT THE CITY ELECTIONS WAS ENTIRELY LEGAL.

The first of plaintiff's list of alleged failures is this:

25. The Defendants failures include, but are not limited to, the following:

a. Illegally attempting to delegate the statutory election duties of Weathers, as City Clerk for the City of Coeur d'Alene, and the Mayor and City Counsel to Kootenai County and Daniel J. English and/or Deedie Beard.

Amended Complaint, p. 11.

Although the legal grounds are not spelled out in the Amended Complaint, counsel for plaintiff has argued in meetings with opposing counsel that the amendments made by the 1993 Idaho Legislature that exempted cities from compliance with the provisions of the Uniform District Election Law, Idaho Code §§34-140 et. seq. prevented the City of Coeur d'Alene from contracting with Kootenai County to conduct its election. The operative paragraph upon which counsel relies in Section 34-1401 is this:

Section 34-1401 . . .

School districts governed by title 33, Idaho Code, and water districts governed by chapter 6, title 42, Idaho Code, irrigation districts governed by titl3 43, Idaho Code, ground water districts governed by chapter 52, title 42, Idaho Code and municipal elections governed by the provisions of chapter 4, title 50, 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. . . .

The underlined portion of the excerpt to §§34-1401 was added as an amendment by House Bill 330 enacted along with House Bill 351 by the 1993 Legislature. Attached hereto are copies of the legislative proceedings attendant to House Bill 330.

The Statement of Purpose recited that the H.B. 330 was intended to make the city election conform to the dates, conform city registration to state registration, give both the county and city clerk registration authority and conform poll openings to state law.

Plaintiff's counsel misinterpreted "Exempt." The amendment was added because the Municipal Code had special provisions for voters and voting just as do school districts and water districts. "Exempt" is defined in Black's Law Dictionary (7th Ed) as follows:

Exempt, adj. Free or released from a duty or liability to which others are held – persons exempt from military service – property exempt from sequestration. . . .

p. 563

Cities were released from liability in the event that any election did not conform to some provision in Chapter 14 of Title 34. "Exempt" did not mean "prohibited from." Just as anyone who is exempted from military service may voluntarily enlist so may a city choose to abide by any or all of the provisions of Chapter 14, Title 34, particularly including the last paragraph of §34-1401:

> **A political subdivision may contract with the county clerk to conduct <u>all or part of</u> 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.**
>
> (Underlined was part of HB330 amendment.)

Rather than barring cities from utilizing county election services, the sponsors of House Bill 330 saw the bill as facilitating county election services. The Statement of Purpose for House Bill 330 identifies at the bottom as "Contact: Shirley Mix, Association of Idaho Cities."1 In the final page of the legislative record is the Memo on House Bill 330 from Shirley Mix which contains this explanation:

> **There is only one change from last year's consolidation bill: city clerks have the option to conduct their city elections <u>or to contract with the county to do so.</u> That's an important option to city clerks, because their limited budgets require them to save taxpayer dollars wherever they can. In most cases, city elections cost less than do elections run by the counties. Many cities use paper ballots, for instance, while counties use more expensive methods.** (Emphasis supplied.)

1 The name at the bottom of a Statement of Purpose on a bill identifies the entity sponsoring the bill. Source, wife Mary Lou, State Senator for 12 years. The "Reed" shown on the Senate Committee motion to approve is Mary Lou.

On November 3, 2009, Kootenai County provided full election services comparable to Coeur d'Alene for Hayden, Huetter, Post Falls, Fernan, Hauser and Rathdrum.

Idaho Code §50-429 provides the following which was new law created in House Bill 330:[2]

> **(4) The secretary of state is authorized to provide such assistance as necessary, and to prescribe any needed rules or interpretations for the conduct of elections authorized under the provisions of this section.**

As evident from the letter by Special Deputy Tim Frist, the Secretary of State has specifically approved the conduct of the city election on November 3, 2009. See Dan English Affidavit.

Finally, under the Idaho Code §50-404, the city clerk is given authority to have anybody to carry out the election:

> **50-404. Powers of city clerk. [Effective until January 1, 2011.] (1) the city clerk with consent of the council may employ such persons and procure such equipment, supplies, materials, and facilities of every kind he considers necessary to facilitate and assist in his carrying out his functions in connection with administering the election laws.**

That is exactly what was done for the city council in Resolution No. 09-033 and the contract attached to plaintiff's Amended Complaint as Exhibits A-1 to A-6.

The agreement sets forth the authority for the two governments to agree as follows:

> **WHEREAS, the City and the County, pursuant to the provisions of Idaho Code §67-2332, may enter into agreements enabling each to cooperate with the other to provide services and facilities for their mutual social, political**

2 As currently codified, the black letters following §50-429 read as to be effective January 1, 2010. However, the quoted wording above is part of House Bill 330 and is in §50-429 presently in effect.

and economic advantage; and . . .

In summary, three separate code sections gave the City of Coeur d'Alene full legal authority to delegate the statutory election duties to officials of Kootenai County.

Idaho Code §34-1401, §50-404 and §67-2332. The allegations of illegality in delegation is three times in error as any reasonable inquiry prior to filing would have fully disclosed.

II. IDAHO COURTS HAVE NEVER ANNULLED AN ELECTION

Idaho Code §§ 34-2001 et seq. provide the basis for challenges in city, county, state and other elections. With the sole exception of Idaho Code § 34-2001 A (bond election), the entire code sections §34-2001 through §34-2027 were enacted by the first Idaho Legislature in 1890 – 1891 and have remained unchanged to this date.

Plaintiff's complaint in Paragraphs 23 through 25 makes various allegations of election errors following which plaintiff states:

CAUSE OF ACTION TO SET ASIDE, VOID, ALL IN PART, THE ELECTION

The labeling on the face of the Amended Complaint is the same.

AMENDED COMPLAINT PURSUANT TO TITLE 50, CHAPTER 4, TO SET ASIDE, VOID, ANNUL, ALL OR PART, CITY OF COEUR D'ALENE NOVEMBER 3, 2009 GENERAL ELECTION

In Paragraph 23, plaintiff asserts the right to appeal ". . . and obtain an Order of the Court setting aside, voiding, and/or annulling the said election pursuant to Idaho Code §50-406. " That code section allows for appeal, but says nothing about relief to be awarded by a court on appeal.

Paragraphs 24 and 25 again set forth numerous allegations of legal errors in the conduct of the election. After notations "Injunction" and "Bond," the amended complaint concludes with this prayer for relief:

PRAYER FOR RELIEF

WHEREFORE plaintiff prays for relief from the Court as follows:

1. **For Judgment declaring that the 2009 City of Coeur d'Alene municipal election is set aside, void, and annulled in total; and**

2. **For Judgment declaring the 2009 City of Coeur d'Alene municipal election for Seat 2 is set aside, void, and annulled;**

There has never been an Idaho Supreme Court opinion from the first in 1890 to the most recent, *Noble v. Ada County Elections Board*, 135 Idaho 495, 20 P.3d 679 (2001) in which the Idaho Supreme Court set aside, voided or annulled any election. To the contrary, the Court has continually admonished against any such drastic remedy and, even when ruling in favor of a challenging candidate, carefully limited review of election results to viewing the testimony of alleged illegal voters.

The very first case involved an election found to be entirely illegal, but the judgment was not to set aside, void or annul the election. *Chamberlain v. Woodin*, 2 Idaho 642, 23 Pac. 177 (February 13, 1890), a pre-statehood case. The decision must be put the context of the anti-Mormon sentiment in Idaho as reflected in the debates in Constitutional Convention in 1889 on how and whether to disenfranchise Mormons. See Colson, IDAHO CONSTITUTION (1991) "Suffrage and the Saints." pp. 149 – 159.

The case involved the general election for sheriff in territorial Bingham County in 1888. Appellant had the most votes. Respondent sued. The District Court held that

illegal votes had been cast, deducted the same and declared the respondent as elected. The illegal voters were ". . . those persons who claimed to have withdrawn from the Mormon church just prior to the election." 2 Idaho at 647.

The District Court refused to accept the withdrawal and the Idaho Supreme Court affirmed:

> **They (**Mormon voters**) also testified their reason for leaving the church was their desire to vote, and be endowed with all the privileges of American citizenship; that, while they had, two years prior, been denied the privilege of voting for the same reason, they had not until shortly before the last election been impressed with the gravity of the situation, and that the desire to change their s*tatus* came upon them rather suddenly. While claiming they had acted in good faith, most of them admitted they still wore their "endowment garments." The general explanation of this was, they would wear them until they wore out, but one explained, "they will never wear out."**

2 Idaho at 649 – 650.

Although the Court recited that ". . .the testimony shows the election was a farce," it did not annul the election but simply upheld the deduction of illegal votes to declare the non-Mormon candidate the winner. 2 Idaho at 648.

In 1899 in *Ball v. Campell*, 6 Idaho 754, 59 P. 559, the Idaho Supreme Court reviewed on appeal the complaint brought by the losing candidate for the office of clerk of the district court in Bannock County. The complaint alleged ". . .malconduct by the judges of the election in said Pocatello Precinct No. 2 . . .was fraudulent, corrupt, illegal, unlawful, and void, and the same should be set aside and annulled. . ." 6 Idaho at 756.

In that plaintiff Brannon's allegations are primarily directed at absentee votes which are counted as if in a separate precinct, the relief sought is comparable.3

The sole question before the Supreme Court was whether the action of the District Court in sustaining the demurrer to the complaint, (i.e., dismissal) was erroneous. 6 Idaho at 756. The Court sustained the demurrer:

> **The primary object of our election law is to secure the elector a free, untrammeled expression of his will concerning the matters submitted for decision, unnamed by intimidating influences, uncontrolled by corrupt or fraudulent practices; and, when the will of the elector has been expressed as required by law, such expression must not be set aside or negative for light or trivial causes. Before the court will assume to set aside the expressed will of a majority of the electors of a county or precinct, it should be well satisfied that there has been such a disregard of the provisions of law enacted for the conduct of elections as taints the entire poll with fraud. It is not every irregularity that will justify the court in invalidating the poll of an entire precinct.**
>
> 6 Idaho at 758.

The demurrer to this complaint was sustained, the prayer to annul the election not stating a cause of action:

> **More good will be accomplished by the honest, energetic action of a few good men at the polls, in endeavoring to preserve the purity of the election, than by any number of contests instituted after the election, and too frequently, we fear, founded upon recollection and reminiscence.**
>
> 6 Idaho at 760.

Huffaker v. Edgington, 30 Idaho 179, 163 Pac. 763 (1917) was a suit challenging the results of a mayoral election in Idaho Falls where Edgington defeated Clark by nine votes. The District Court, after hearing witnesses, deducted illegal votes

3 Plaintiff Brannon won the absentee votes by 1,071 to 946. If the entire absentee ballots were rejected, defendant Kennedy would win by a much larger margin.

from both candidates, which left Edgington with a majority of six votes and the declared winner. The Supreme Court affirmed.

The District Court found that the election officers had acted in good faith and without intentional wrong although there were same irregularities in registration and in conduct. 30 Idaho at 184. The Supreme Court found there was no intentional wrong-doing or fraud so as to vitiate the election. 30 Idaho at 105.

Appellant cited a number of errors and sought to throw out all votes in Ward I. The argument was rejected:

> **While the vote of a precinct may be rejected in certain instances, it is a drastic measure used only in emergencies, and should not be resorted to whenever it is possible to purge the election irregularities without depriving citizens of their vote. Such action has the effect of punishing and invalidating the votes of loyal citizens in order to prevent the fraud and wrongdoing of dishonest persons seeking to vote illegally, and while in some instances it is justified, in this case the irregularities complained of were not such as to warrant the court in rejecting the vote of the precinct referred to.**
>
> 30 Idaho 186.

Throughout the opinion, the concern of the Court was not upon the illegal voters' votes but upon protecting against the disenfranchisement of innocent voters because of a mistake by election officers:

> **It is inevitable that mistakes shall occur in elections because of the inexperience of election officers, and sometimes the law cannot be strictly complied with, but where the will of the citizen legally entitled to vote is apparently correctly expressed, such mistakes or oversights as do not result in making the election uncertain will not be allowed to defeat the choice of the electors.**
>
> **. . .**

> **Hence, as a general rule, statutes prescribing the duties of election officers relative to registering voters should not be so construed as to make the right of citizens to vote depend upon a strict observation of the law by such officers.** (10 Citations to seven states).

30 Idaho at 186.

Jaycox v. Varnum, 39 Idaho 78, 266 Pac 285 (1924), involved an election for clerk in Jerome County where the competing candidates were separated by four votes.

Like *Huffington,* the District Court heard testimony from 20 witnesses named in the complaint as having voted without being registered. The District Court deducted votes from both candidates leaving the respondent with a three vote instead of four-vote margin.

The Supreme Court opinion made a careful examination of relevant parts of the Idaho Constitution and prior cases including *Chamberlain v. Woodin and Huffaker v. Edgington.* The conclusion was that there had been three illegal votes unknown as for which candidate but no fraud or corruption. The challenger had failed to meet his burden of proof:

> **In order to overcome the *prima facie* effect of the returns, it would seem incumbent on appellant to prove not only the illegal votes, but also for whom they were cast. Both these elements of proof were required to show that the illegal votes affected the result, and that, but for them, appellant would have been elected. It would be neither just nor logical to put the contestee at a disadvantage, because contestant was unable to sustain the burden of proof which rested upon him, contestee not being responsible for that fact.**

39 Idaho at 92.

That case and conclusion was cited in *Henley v. Elmore County*, 72 Idaho 374, 242 P.2d 855 (1952):

> **The burden of proof was on the respondent, as the contestant, to prove two things: Illegal votes, and that these illegal votes changed the result of the election. Jaycox v. Varnum, 39 Idaho 78, 226 P. 285.**
>
> 72 Idaho at 281.

The most recent election case is *Noble v. Ada County Elections Board,* 135 Idaho 495, 20 P.3d 679 (2001) in which the losing primary candidate, plaintiff and appellant, was represented by attorney Starr Kelso. The complaint in the *Noble* case was close to being identical to the complaint in this case. Noble alleged that the Ada County Clerk had erred in handling absentee ballots, had allowed absentee voters to register and vote illegally and that 189 absentee ballots should be thrown out.

The District Court rejected all of these arguments and the Supreme Court affirmed. In presenting the identical claims dismissed in Noble, is attorney Kelso seeking to have the Supreme Court reverse its decision made nine years ago in his losing case?

The District Court agreed with Noble that the clerk had made a procedural error in failing to stamp the 189 absentee ballots but refused " . . .to disenfranchise 189 electors" 135 Idaho at 501. The Supreme Court affirmed:

> **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.**

135 Idaho at 501-502.

As in this case, Noble argued that twenty-one absentee ballots (in this case four) should be thrown out because they were kept in the administrative office instead of being delivered to the respective precinct poll judges for opening. 135 Idaho at 502. The District Court found and the Supreme Court concurred that Ada County had handled absentee ballots received on election day entirely properly. 135 Idaho at 503.

In conclusion the Supreme Court citing *Chamberlain v. Woodin, supra*, held that ten illegal votes, failure to stamp 185 ballot return envelopes and numerous other procedural errors did not constitute "malconduct" justifying disenfranchising innocent voters:

> **A showing that election officials failed to follow every election procedure precisely, without more, is insufficient under I.C. §34-2101 (1). Noble's evidence does not demonstrate that the election process was unfair or that the results are contrary to the actual will of the electorate. We, therefore, uphold the district court's finding that Noble failed to meet his burden of proof under I.C. §34-2101 (1).**

135 Idaho at 504.

The law in Idaho is as stated in *Noble v. Ada County Elections Board* and the long line of cases dating back to 1890. If plaintiff Brannon proved every allegation in his Amended Complaint (which he cannot do), the results of the Coeur d'Alene city election would not change. Brannon's complaint to set aside, void and annul the election fails to state a cause of action and must be dismissed with prejudice upon

precisely the same grounds as given by the Idaho Supreme Court in sustaining the demurer in 1899 in *Ball v. Campbell, supra*. This case is not going to reverse 100 years of law based on code provisions unchanged since statehood.

To summarize again, there is no allegation that there was any fraud or corruption or, indeed any irregularity all in the conduct of the city election nor would there be any fact to support a charge. Unlike there was no hint that any voter had, as alleged in *Chamberlain v. Wordin, supra*, attempted that he had tried to hide the fact that he was not eligible to vote.

Without making any claim to support an extreme ruling that would disenfranchise the 6, 325 persons who voted on counsel text No. 2 (See Amended Complaint, Exhibits D-2 and D-3).

Plaintiff Brannon and his counsel have asked this Court to do what no Idaho Court has ever done under statutes that have not changed since 1890-1891. The caption, content and prayer are reckless, unreasonable and without foundation reflecting absence of reasonable research even into counsel's own reported Supreme Court case.

This Court need not ever reach the last three grounds set forth on pages 2 and 3 above, but these will be touched lightly.

3. No violations occurred. The affidavit of Election Manager Deedie Beard establishes that there were no violations of applicable election laws.

4. The Amended Complaint throws in Jane and John Does A to Z as possible witnesses. A losing candidate filing suit and alleging that

persons voted illegally must identify those persons in his or her complaint. Plaintiff Brannon has named five. He cannot at this time add additional names and suggest that Jane and John Does can be covered in future additions. As stated in *Henley v. Elmore County, supra:*

> **5. Plaintiff is limited to only those named in the Amended Complaint. Subsequent to the filing of the opinion in the above-entitled case, respondent filed a petition for rehearing, contending that by the decision appellants would be permitted, on the taking of further evidence, to submit testimony from persons whose qualifications to vote had not been challenged. Further testimony on the part of appellants, if any, should be limited to the persons challenged by the Amended Complaint.**
>
> 72 Idaho at 382.

CONCLUSION

The Amended Complaint does not state any cause of action. The Idaho Supreme Court has never set aside, voided or annulled any election.

The City of Coeur d'Alene lawfully under Title 34 and Title 50 delegated conduct of the election to Kootenai County. Voting and counting by machine is authorized and lawful. The Coeur d'Alene Absentee Precinct 0073 was established as allowed by Idaho Code § 50-448 and §50-449. There is not and cannot be a separate poll book for the Absentee Precinct 0073.

The four challenged absentee voters Farkes, Paquin and Friend in Canada, and Proft in Iraq were registered voters and were allowed to vote absentee under the Idaho Constitution, and Idaho statutes as were cited in the letter from Chief Deputy Tim Hirst to County Clerk Dan English attached to the English Affidavit.

The only person voting in the city election who was not a resident of the city was Rahanna Zellers and how she voted is unknown. Plaintiff cannot add any other "illegal" voters.

Neither the City of Coeur d'Alene nor the Kootenai County Elections Office violated the law nor allowed any improper voting practice. The Amended Complaint in paragraphs 23, 24 and 25 is replete with false allegations and demonstrates ignorance and/or misinterpretation of applicable election law.

The original complaint of plaintiff Jim Brannon was filed without any evidence and lacked any grounds to challenge the conduct of the city election on November 3, 2009 and the results of the election for Council Seat No. 2. Plaintiff Brannon and his attorney, having full knowledge of *Noble v. Ada County Elections Board,* must be charged with responsibility for bringing a complaint that is frivolous, unreasonable and without foundation. As to all defendants and particularly as to incumbent candidate defendant Mike Kennedy, the lawsuit is unacceptable harassment not made in good faith and reflecting lack of reasonable inquiry as to the law and the facts.

Dated this 5th day of January, 2010.

Scott W. Reed, One of the
Attorneys for Kennedy

CERTIFICATE OF SERVICE

I certify that a true copy of the above and foregoing was served by first class mail, postage prepaid, this 5th day of January, 2010 to:

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_____
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