

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

JIM BRANNON,)	
)	
PLAINTIFF,)	CASE NO. CV2009-10010
)	
Vs)	MEMORANDUM DECISION
)	
CITY OF COEUR D'ALENE,)	
IDAHO, a municipal corporation, et al,)	
)	
DEFENDANT(S).)	
_____)	

ISSUES

This is an election contest case pursuant to Idaho Code Section 34-2001. The issues presented are (1) whether there were sufficient illegal votes cast to change the outcome of the election and justify the Court in setting aside the election results under Subsection (5); (2) whether there was an error in counting the votes sufficient to change the outcome of the election and justify the Court in setting aside the election results under Subsection (6); and, (3) whether there was any evidence of malconduct supporting the Motion to Amend filed by the Plaintiff seeking to set aside the election under Subsection (1).

I. ILLEGAL VOTES

On the issue of illegal votes under Subsection (5), Plaintiff listed, as required by Section 34-2017(b), twenty-two (22) potential illegal voters. Eleven (11) were qualified voters who were registered to vote and did cast a ballot. Ten (10) of these were absentee voters, and one was a registered qualified voter who

voted at the polls on election day. Although there are some irregularities as to how nine (9) of the absentee ballots were received or the form of the return envelope, no claim was made at trial that any of these votes were illegal. As to the 10th absentee vote (of Patricia Harris), no evidence was presented that the voter voted twice. As to the one election day voter, (Marte Chamness), the Court has determined Chamness to be a legal voter.

Of the remaining eleven (11) individuals listed by Plaintiff pursuant to Section 34-2017, Subsection (b), as allegedly illegal votes, the votes of six (6) voters have been found to be illegal. The votes of Nancy White, Dustin Ainsworth, and Gregory Proft have been deemed illegal and for whom the vote of each was cast was determined by stipulation. Two of those votes were for Kennedy, and one was for Brannon. Therefore, the vote difference between Brannon and Kennedy has been reduced from five to four.

There remain three illegal voters who testified as to how they cast their vote. They are Susan Harris, Ronald Prior, and Rahana Zellars. The Court has not yet made a determination as to how they voted. Susan Harris and Ronald Prior both testified that they did not recall who they voted for. Rahana Zellars testified that she believes she probably voted for Kennedy.

With regard to Susan Harris and Ronald Prior, the only evidence that contests their testimony that they do not remember who they voted for is the impeachment testimony by an investigator who interviewed them following the election. The investigator testified that both individuals indicated to him that they voted for Kennedy. However, the investigator testified that when he first contacted each of those two individuals, they both stated that they did not recall who they voted for. It was during continuing questioning by the investigator that statements were made about how they voted.

Both individuals testified at trial that the private investigator's statements that they had told him that they had voted for Kennedy were not an accurate summary of their comments to the investigator as to the true nature of their knowledge. The Court finds the testimony of each that they do not remember to be credible. It is therefore unnecessary to rule on the legal issue raised by the

defense that the impeachment testimony is not substantive evidence and cannot be used as a matter of law to determine that Harris or Prior voted for one candidate as opposed to the other. The Court concludes that Susan Harris and Ronald Prior are credible with regard to their in-court testimony which is that they do not recall for whom they voted in the Kennedy-Brannon race.

Rahana Zellars testified that she was uncertain as to her vote, but she also testified that she thought she probably voted for Kennedy. A statement that someone thinks they “probably” voted for someone does not necessarily mean one is certain enough to swear under oath as to whom they may have voted. The statement that one “probably” voted for a candidate could be immediately followed by another statement that the voter is nonetheless not at all sure. Certainly one who thinks something might be probable may be unwilling to swear under oath that it is in fact true. However, the nature of Rahana Zellars’ testimony, and the way she gave it, with the apparent degree of certainty upon which she stated her “probability” of having voted for Kennedy, causes the Court to conclude that she did in fact vote for Kennedy. While the reasons given (she thinks she voted for Kennedy because she always votes for the Democrat) are not clear to the Court, since the race was nonpartisan and no party affiliation was shown on the ballot, nonetheless the Court finds that, for whatever reason, Ms Zellars was comfortable enough about the degree of the probability of her recollection that the Court can find that her statement that she probably voted for Kennedy is a correct statement of how she voted.

Regarding the aforementioned three (3) illegal votes in question, the Court finds that two cannot remember how they voted and one voted for Kennedy. This reduces the vote total for Kennedy by one, so the vote difference is now three (3).

The above discussion still leaves still five (5) individuals as potential illegal voters pursuant to Subsection (b). These are five (5) UOCAVA voters. (Paquin, Farkes, Friend, Dobsloff, and Gagnon). The Court has determined Dobsloff to be a legal voter, pursuant to the applicable UOCAVA criteria.

With regard to Paquin, Farkes, Friend, and Gagnon, there is the threshold issue of the legality of their residence. Defendants claim the residency issue is moot because there is no evidence as to how any one of the four voted. 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.

Nonetheless, the issue of UOCAVA votes by Paquin, Farkes, Friend, and Gagnon arguably relates to alleged irregularities in the election process. The Court will therefore examine the legality of the residence of the four (4) individuals to determine the legality of their voter status.

As to Monica Paquin, there was essentially no evidence other than the fact that she was no longer living at the Coeur d'Alene address given. However, under UOCAVA, Paquin was legally entitled to vote absentee. She was living overseas and had listed her last place of abode as her place of voting. She did not testify at trial, nor was there any evidence that would indicate that she was living abroad other than temporarily. Therefore, there is no evidence in the record for the Court to find her vote illegal.

With regard to Kimberly Gagnon, the testimony at trial established that she is a spouse of a current member of the military and is a legal voter under UOCAVA. The evidence at trial only further supported her legal status to vote absentee pursuant to her UOCAVA application.

With regard to Friend, he listed a commercial office as a residence address on his UOCAVA paperwork. The commercial nature of the address was established by evidence introduced during the trial. The fact that the location is a commercial space was not evident from the voter information. Apparently, the building was formerly a residential house, and has been converted to office space. Again, under UOCAVA, Friend was living abroad and entitled to list Coeur d'Alene as his voting residence as long as that was his last place of residence. While there may be an issue over listing what is apparently a commercial space when asked to list a residential address, there is no evidence showing that he was not a qualified voter and legal resident of the City of Coeur d'Alene prior to

moving abroad. Friend did not testify. Therefore, under the UOCAVA criteria, there is no evidence upon which the Court could make a finding that he was an illegal absentee voter.

As to Farkes, no evidence was submitted during trial disputing her UOCAVA status as a legal voter. The UOCAVA paperwork submitted to the County shows that Farkes met the UOCAVA criteria, and the Court finds Farkes to be a legal voter. Mr. Hurst's opinion that Farkes was a legal voter, even though that opinion was based solely upon her registration and UOCAVA application, is therefore correct.

Therefore, the Court finds that Paquin, Friend, Gagnon, and Farkes, were legal voters.

While the Court understands the Plaintiff's concerns over election officials relying upon the UOCAVA criteria to qualify absentee voters, the County is simply following the law. The Court does not find there was an obligation on the County to check the address listed by Friend to see whether it was a commercial location or a residential location. A failure to investigate the accuracy of the information submitted for UOCAVA status is not any kind of irregularity by election officials. There is no duty to investigate. Any failure to do so does not in any way constitute an irregularity. This Court can hardly find the County at fault when it relied on the UOCAVA criteria.

While Plaintiff did not prevail on the UOCAVA issue to establish illegal votes, the Plaintiff does raise legitimate concerns. The Court held on reviewing Dobsclaff's status that meeting the UOCAVA criteria for valid absentee votes for federal and state elections would also satisfy the requirement for municipal elections. As Plaintiff points out, the statute regarding the municipal residency requirement is slightly different than for federal or state. The Court could find no applicable case law, and held that UOCAVA was meant to be applied equally to a citizen's right to vote absentee, and that therefore this Court would not differentiate the right to vote absentee based upon whether an election was federal, state or municipal. The issue will remain unsettled without further clarification by either a legislative body or appellate court.

The Court concludes that Paquin, Friend, Farkes and Gagnon are legal voters. The final tally of the twenty-two (22) individuals listed as alleged illegal voters pursuant to Section 34-2017(b), after striking the votes found to be illegal, leaves Kennedy with three (3) votes more than Brannon. The illegal votes received are insufficient to change the election result.

II. ERROR IN VOTE TALLY

(a) In Person Voters

Plaintiff has presented evidence as to certain unknowns regarding in person voting on election day. For example, Plaintiff points out that for fifty-three (53) votes at the polls on election day, no record exists as to whether the voter received a City or County ballot. Plaintiff argues this inadequacy of record keeping is an irregularity which justifies the Court in finding the vote tally untrustworthy.

There is no evidence that any of the fifty-three (53) in person votes were by unqualified voters. A failure to keep a record is not proof of an illegal vote. The burden on a party challenging an election result is to prove facts that would have made a difference. There is simply nothing in the record that would support any finding that any of these fifty-three (53) in person votes were illegal or that, even assuming there were illegal votes, such votes were cast in a manner that would have made a difference.

The issue of the inaccuracy of the vote tally is limited to the dispute over the count of absentee votes. Idaho law holds that irregularities in election procedures do not disenfranchise legal voters. The evidence regarding in person voting, if it demonstrates any irregularities, does not in any way cast any doubt on the validity of the in person votes, (other than was discussed in the above section regarding alleged illegal votes).

(b) Absentee Ballots Cast

The alleged error is that the final tally of absentee ballots cast (2,051), as adopted by the City in declaring election results (Plaintiff's Exhibit 86), is a larger number than the number of absentee return envelopes actually received. Since each return envelope contains only one ballot, Plaintiff claims that there must be an error in the vote tally, because the County ran more absentee ballots through the machine than the County had actually received from voters.

Where the alleged error is that there were more ballots counted than there were voters, it is not necessarily required to establish how the "extra" ballots were voted. How the votes, if any, were cast on the alleged "extra" ballots cannot be determined. No voter ever existed, and no inquiry can be made. Under the Subsection (5) alleging illegal voters, it is necessary to determine how the illegal voter voted, so a determination can be made as to whether the illegal votes made a difference. Under Subsection (6), the test is not a mathematical count, but whether there were "extra" ballots counted in an amount great enough that the votes could have made a difference. By way of illustration, if 1,000 people voted in an election and 2,000 ballots were counted, and candidate A had 1,001 votes and candidate B had 999 votes, a court could declare a new election based on an error in vote counting (1,000 ballots that did not get cast by voters were erroneously counted as votes) that made the difference in the outcome. This conclusion could properly be made under Subsection (6), even though no determination could be made as to how the 1000 extra ballots were in fact voted.

In this case, Plaintiff claims that in a 6,370 vote election, of 2,051 absentee ballots cast, ten (or more) were not ballots that voters filled out. Even if only the absentee vote is considered, an alleged ten extra ballots would be only $\frac{1}{2}$ (one half) of one percent of the 2,051 ballots. Nonetheless, in a five (5) vote election, (out of 6,325 votes counted), although no one could know how the alleged ten or more "extra" ballots were filled out, the Plaintiff's claim raises the mathematical possibility that if all ten ballots contained votes for the race in question, and if all ten votes were cast for the winner, then the error in counting

these extra ballots in the vote tally made the difference in the election. Therefore, this allegation states a claim that requires a trial. (The same issue over counting more ballots than there were voters could arguably be addressed as an irregularity constituting malconduct under Subsection (1), but the Court has ruled that this issue is more properly raised and decided under Subsection (6).)

The Court finds Judge Marano's ballot count of 2,051 for physically existing absentee ballots to be accurate. The 2,027 ballots, in boxes 3-A, 3-B, and 4 which were run through the machine, were counted by Judge Marano on June 22, 2010. The seventeen (17) duplicate ballots which were run through the machine were counted by Judge Marano on July 2, 2010. The seven (7) write-ins were valid ballots which were run through the machine and were counted by Judge Marano on July 14, 2010. The sum for ballots cast is 2,051.

Plaintiff's Exhibit No. 85 is a County generated document for the City General Election printed on November 4, 2009. It shows 2,051 absentee ballots cast in the city election. The County then prepared a document (Plaintiff's Exhibit No. 86) to present to the City for the purpose of the City Council accepting the election results. Plaintiff's Exhibit No. 86 states the number of absentee ballots is 2,051. The City accepted that number when accepting the results of the election as presented by the County election officials.

(c) Discrepancy Between Absentee Ballots Cast and Absentee Ballots Received

The central issue at trial was whether the Plaintiff has established that the County's figure of 2,051 absentee ballots cast was greater than the amount of absentee ballots actually received, and, if so, what was the amount of the discrepancy.

Plaintiff argues that there are various documents in the record that establish that the actual number of absentee ballots received was substantially less than 2,051. While the number of votes cast will logically be less than the number of ballots (many voters may not bother to vote on all offices or issues appearing on a ballot), where the number of ballots run through the voting

machine exceeds the number of ballots actually received from voters, there is the potential that votes have been counted and included in the final vote tally that were on ballots that had not been filled in and voted by actual voters. The greater the number of "extra" ballots, and the closer the election, the greater the potential for "extra" votes to change the outcome of an election.

Plaintiff's claim is that records in evidence show that the machine count for absentee ballots cast is greater (perhaps ten (10) more) than the number of absentee ballots that the County actually ever received. In an election decided by five (5) votes, Plaintiff's claim that the true number of valid absentee ballots actually received from voters may be substantially less than the 2,051 ballots shown as cast on the final vote tally raises a meritorious issue. Although there is no way to tell if the "extra" ballots resulted in "extra" votes for a certain candidate in the race in question, the potential exists. Although no one could ever know how an "extra" ballot was voted, Plaintiff argues that, since the election was decided by only five (5) votes, and given various other irregularities, a new election should be held.

The allegation of more ballots having been counted than ballots received raises a potentially meritorious issue as to the accuracy of the vote tally. And when the vote difference is five (5), this alleged discrepancy of ten or more "extra" ballots may be large enough to arguably have made a difference, depending upon all the circumstances.

As consistently pointed out by Plaintiff's counsel, the problem is that if ten or more ballots are included in counting the final vote tally, which such ballots in fact were never filled in by a voter, a recount is of no help. The ten ballots that should not be counted are automatically included in the recount, and the recount will simply repeat the mistake. The statistical data of the recount does not produce any information.

The Court holds that, if there were ten or more ballots counted, which were "extra" ballots in fact never sent in by a voter, then the potential of ten "extra" votes could be sufficient in a five vote election under Subsection (6) to

establish an inaccurate vote count that made a difference, depending upon all the circumstances as shown by the evidence at trial.

(d) Absentee Return Envelopes

The Court finds that the number of 2,051 is an accurate count of ballots actually ran through the machine (absentee ballots cast). The evidence at trial was undisputed that there was only one absentee ballot contained within each absentee return envelope received. The dispute is about the number of valid absentee return envelopes that the County actually received from voters.

During the litigation, the County produced 2,086 absentee return envelopes, which Judge Marano counted. Four of these, for some reason, could not be determined as City or County. Judge Marano subtracted all four, arriving at a total of 2,082 absentee return envelopes received. At trial, the County presented evidence that thirty-two (32) of the return envelopes presented to Judge Marano were from the County. The Court finds that the County has physical custody of 2,050 valid absentee return envelopes received for the City election.

The discrepancy over the number of valid absentee return envelopes received is created by the existence of the Secretary of State database. This is a system for the entire State, under the control of the Secretary of State's office. Each county is required to participate. It is a centralized system, designed to provide up to the minute data on registered voters in the State of Idaho. The Secretary of State database shows voter identification, voter name, absentee code, residence address, mailing address, precinct, request date, issued date, received date, and, if voided, the reason.

The database depends upon each County to input the data. The database for absentee ballots cast in the 2009 City of Coeur d'Alene election was inputted by Kootenai County election workers.

The entries of most importance in this case are the request date for the absentee ballot, the issued date, the received date, and whether the ballot in the

received envelope was voided. This information tracks the record that the election official is to keep pursuant to Section 34-1011, Idaho Code, (or 50-451).

As testified to by Mr. Hurst, a data entry system only provides information based upon the entries of data into the system. If the data is bad, or the entries are inaccurate, the usefulness of the information produced by the data entry system is reduced.

There are several different versions from the State's database which are in evidence. One is dated November 6, 2009, Plaintiff's Exhibit 5. Another is dated November 16, 2009. A third is dated November 24, 2009. The fourth is dated August 19, 2010. The most important is the November 6, 2009, database. (Plaintiff's Exhibit 5). Mr. Hurst testified that, of all the databases, that would probably be the most accurate. Furthermore, it is the November 6, 2009, database that prompted Mr. Spencer's inquiry about the apparent discrepancy between the 2,051 tally of total absentee ballots cast in the City Canvass and the 2,047 absentee return envelopes ballots received as shown on the November 6, 2009, database. Furthermore, it is Plaintiff's Exhibit 5 that shows that, after deducting out the voided entries, the total of valid absentee return envelopes drops to 2,042. Plaintiff's Exhibit 5. Since the November 6, 2009, database shows that one entry was mistakenly made twice, this number drops to 2,041, the number probably most often referred to during the trial.

The potential of "extra" votes is based upon the City tally showing 2,051 absentee ballots cast, when the November 6, 2009, Secretary of State database shows only the 2,042 valid absentee envelopes returned. This has been in this case since the filing of the Complaint. Subtracting for the discovered duplication, the 2,041 figure for absentee return envelopes, or the potential of a ten (10) vote discrepancy, was established during trial.

The Court does not find the databases other than Plaintiff's Exhibit 5 to be very useful. The system is in real time, so the further a database is removed from the date of election, the less reliable. The August 19, 2010, data base is apparently from a different search parameter, which merely underscores the fact

that the answer produced by the Secretary of State's database changes, depending upon when and how the question is asked.

Furthermore, relying upon the database system is not justified, because, as Mr. Hurst testified, the system is only as good as the data entries. If any entry is omitted or duplicated, the data system simply reports invalid information.

Mr. Hurst was quite clear that the State's database system was not intended to replace the record that the law requires the election officials to create and retain. However, Ms. Beard seemed to be under the impression that the Secretary of State database was in lieu of the County keeping a Section 34-1011 report and that the database was the only report the County had.

Ms Beard, however, also testified she relied upon the machine count shown on Plaintiff's Exhibit 85, and not on the database, because the database was not accurate. Furthermore, Ms Beard testified daily reports of the absentee ballots were made. Ms Beard appeared to be testifying that the County had the required information to make the report, but did not need to independently produce the report, and could instead provide a copy of the State database as the "record".

Providing a database known to be inaccurate, and then not being able to provide the Section 34-1011 record addressing the discrepancy when noted by an inquiring citizen, has been a factor in this litigation. If, when a citizen requested a report on November 6, 2009, regarding the November 3, 2009, election, the County had produced the record showing 2,051 absentee ballots cast and the 2,050 absentee return envelopes received, the issue of the one missing absentee return envelope could perhaps have been resolved.

There was no evidence produced at trial showing that the stack of 2,050 returned envelopes does not include all 2,041 valid names on the November 6, 2009, database report. The record contemplated by Section 34-1101 turns out to be the stack of 2,050 absentee return envelopes. The nine (9) names that do not appear on the State's database would be on nine (9) of the return envelopes that physically exist in the custody of the County.

The Court is well aware that there is no Section 34-1011 report in evidence, and that there is no such report because no report was made. If such a record existed, that record could have been compared to the Secretary of State database. Instead, the 2,050 absentee return envelopes were apparently not available to the Plaintiff prior to discovery responses in July 2010.

In fact, the 2,050 is the number arrived at during the September trial by subtracting the thirty-two (32) return envelopes identified by the County as being County ballots from the 2,082 figure counted by Judge Marano.

The comments about the timing of disclosures of documents constituting a record is not a criticism by the Court of any of the parties (including the County) or their attorneys. Election litigation is very complex. The statute has been on the books since 1890, before women had the right to vote. Times have changed. Litigation under the Idaho Rules of Civil Procedure bears no resemblance to litigation in 1890. Society is much more mobile. The statute requires a trial in thirty (30) days, which in modern day society and modern day litigation has proved unworkable, at least in this case. The Court finds the parties and counsel did their best in litigating a difficult case.

Nor does the Court fault the County election officials regarding the Section 34-1011 record. Reliance upon the Secretary of State database is understandable, and the database is accurate enough that only in an extremely close election could any discrepancy create an issue. Having listened to six days of testimony, the Court is impressed by the complexity of the election process, and at how well the County ran the election. Notably, there was no evidence at trial, including any testimony from the Secretary of State's office, as to how just exactly County election officials were to create and maintain this record in municipal elections. Nonetheless, the fact that this determination of what the record would have shown can only be made after six days of trial underscores the need for election officials to maintain the statutorily required record.

In short, the Court finds that the discrepancy between the 2,041 return envelopes shown on Plaintiff's Exhibit 5 (November 6, 2009, database) and 2,050 return envelopes physically counted by Judge Marano is most probably

explained by the failure to input the nine (9) envelopes in the stack of 2,050 along with the names that do appear on the list of 2,041 valid absentee return envelopes shown on the Secretary of State's November 6, 2009, database. Plaintiff's Exhibit 5. The Plaintiff bears the burden of proof, and there is no evidence before the Court that the nine (9) envelopes in the stack of 2,050 absentee return envelopes kept by the County are anything but absentee return envelopes of valid absentee voters. There is no evidence that nine (9) of the envelopes in the stack of 2,050 bear names of people other than qualified voters who actually voted.

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

The fact that there is one missing absentee return envelope is simply insufficient for the Court to find an error in counting the vote. Even though there is an "extra" ballot (in the sense that there is one more absentee ballot than there is absentee return ballot envelopes), the evidence causes the Court to conclude that it is the return envelope being misplaced, and not a ballot that a voter never cast being counted, that explains the discrepancy between 2,050 and 2,051. This is particularly true where there is a complete absence of evidence, or even a suggestion, as to how an "extra" ballot could have been created, by whom or why.

The existence of more absentee ballots cast than absentee return envelopes physically existing in the custody of the County election officials does not, on the facts of this case, create an error in tallying the vote that would have changed the outcome of the election.

III. ALLEGED IRREGULARITIES DO NOT CONSTITUTE MALCONDUCT

Plaintiff has asserted through a continuing motion to amend the complaint, that irregularities in the election process amount to malconduct, requiring this Court to set aside the election. Idaho case law regarding malconduct in association with electoral procedure is limited. However, a review of these cases reveals that irregularities must be sufficient and substantial enough to have potentially changed the outcome of the election, such as through fraud or illegal voting, for such irregularities to constitute sufficient grounds to set aside an election.

In *Chamberlain v. Woodin*, 2 Idaho 642, 23 P. 177 (1890), the court provided a working definition of malconduct:

Our statute does not define what constitutes malconduct of the officers of election, but it must be held that any proceedings which result in unfair elections, that deprive the qualified elector of the opportunity of peaceably casting his ballot and having it counted as cast, or that permit illegal votes to be cast and counted, are within the statutory provisions.

Id. at 645, 23 P. at 178. The Court therein determined that the malconduct, preventing legal votes, in conjunction with allowing illegal votes, justified the trial court's declaration of a new winner in the election. *Id.* at 650, 23 P. at 180.

However, *Chamberlain* is highly distinguishable. The acts constituting malconduct included the arrest of legal voters, illegal votes, threats against legal voters who challenged illegal voters, intimidation of legal voters, and similar behavior. *Id.* at 645, 23 P. at 178. Here, such blatant and fraudulent elective practices are neither present nor alleged. Additionally, the potentially large

volume of illegal votes played a role in the Court's determination where, as here, the alleged illegal voters were identified before the Court and evidence submitted during trial, and, as explained in this memorandum, the illegal votes were not sufficient in number to independently result in a new election or reversal of the election results.

Irregularities alone, without proof of fraud or corruption, have not been held sufficient in the State of Idaho to be considered malconduct for which an election should be set aside, nor was counsel able to provide the Court with authority to the contrary.

In *Noble v. Ada County Elections Bd.*, 135 Idaho 495, 20 P.3d 679 (2000), the court expressly held that “[a] showing that election officials failed to follow every election procedure precisely, without more, is insufficient under I.C. § 34-2101(1) [to show malconduct].” *Id.* at 504, 20 P.3d at 688. Therein, the court rejected as malconduct a number of irregularities, including ten illegally counted votes, the failure of election officials to place time stamps, date stamps, or names and addresses of persons delivering absentee ballots, the failure of an election official to keep track of the number of ballots from prior elections taken from and then returned to a warehouse, discarding voter sequence cards, and the changing of poll books after the canvass to ensure absentee voters received credit for voting. *Id.* at 503, 20 P.3d at 688.

Similarly, *Ball v. Campbell*, 6 Idaho 754, 59 P. 559 (1899) involved many irregularities which appellant/contester argued were sufficient to declare him the winner of the election. There, irregularities included, among other things, individuals voting outside of a private, enclosed space such that spectators could view for whom votes were cast, voters discussing candidates with one another at the polls, voters sharing voting stalls, voters procuring ballots and subsequently leaving the enclosed space and the building without voting and while still in possession of a ballot, and one person was allowed to vote without being registered. *Id.* at 756-57, 59 P. at 560. Therein, the Court explained,

[b]efore the court will assume to set aside the expressed will of a majority of the electors, it should well be 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.

Id. at 758, 59 P. at 560. The court continued:

Should a judge of election, after his attention had 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 charging him with malconduct. But to say that a judge of election is guilty of malconduct because of the commission of irregularities (and none of the acts charged in the complaint amount to more than irregularities, except the voting of one person . . . without being registered) of which he did not have, and cannot reasonably be supposed to have had, any knowledge, when such charge involves such serious consequences as the disfranchisement of many hundred voters, is a proposition we cannot entertain.

Id. at 759, 59 P. at 561. Therefore, the Court held that the trial court properly sustained a demurrer to appellant's complaint, as such complaint did not sufficiently set forth specific facts to warrant the relief therein requested. *Id.* at 760, 59 P. at 560.

Assuming, without deciding, that it is possible for cumulative irregularities apart from any showing of fraud or corruption to provide a court with discretion to set aside an election, such is not present here. Here, a number of election procedure irregularities have been alleged, including allowing illegal votes and errors in taking the vote tally and keeping records. Neither Idaho case law, nor any argument by counsel, provides authority for this Court to cumulatively treat such irregularities as an independent grounds for finding malconduct and thus set aside the election, particularly when the alleged acts are exclusively acts of the County, which is not even a party.

Plaintiff cites *Nelson v. Big Lost River Irrigation Dist.*, 133 Idaho 139, 983 P.2d 212 (1999) as support for the proposition that cumulative irregularities provide grounds for a court to conclude that the election process was not "fair", and, particularly where the election outcome is close, for the court to step in and set aside the election and let the voters decide. This Court views the holding of *Big Lost River* very differently.

In *Big Lost River*, the appellant had lost the November 5, 2006 election by two votes (241 to 239). The appellant brought suit on December 30, 1996. Trial was held by Judge Moss on February 12, 1997. At trial, Judge Moss found that qualified voters had been turned away from voting by election judges' improper challenges. Of the identified voters who had not been able to vote, ten testified for whom they would have voted. Judge Moss found three more would have voted for appellant rather than respondent. As the result of the trial, the appellant (the loser, with only 239 votes) was therefore found to be the leading vote getter, with 245 votes compared to 242 for respondent.

The trial court declared the election contest between appellant and respondent void, refused to declare a winner, and ordered a new election between the two. At the second election, held on May 27, 1997, the respondent was again elected. On August 19, 1997, appellant filed an appeal.

The issue on appeal was whether the trial court had discretion to order a new election. If the trial judge was in error in refusing to declare a winner following the trial, the appellant (the loser at the November 1996 election, 241 to 239, and also the loser in the second election on May 27, 1997) would be able to argue he should be declared the winner, based upon the vote count at the February 1997 trial of 245 for appellant and 242 for respondent.

The Supreme Court held that the trial court had discretion to order the new election, when the number of votes had been found at trial to be sufficient to change the result. *Big Lost River* only addresses the issue of the trial court's discretion to refuse to declare a winner and order a new trial as a remedy, after the court has declared the election void based upon the vote count determined by the court at trial. *Big Lost River* does not stand for the proposition that, even though the illegal votes do not change the election outcome, a court can nonetheless set aside an election based upon cumulative irregularities.

This Court has denied the motion to amend on the grounds the County was not a party. However, this Court finds that there is insufficient evidence in the record as a matter of law to find malconduct, and that the motion to amend can also be denied on the alternative grounds that, even if the County were a

party, the irregularities alleged in the proposed amended complaint simply fail to state a claim for malconduct under § 34-2001(1).

CONCLUSION

The Court concludes that there were insufficient illegal votes cast to change the outcome of the election. The Court concludes that there was no error in counting votes that would change the result of the election. The Court reaffirms, on alternative grounds, its denial of Plaintiff's Motion to Amend. The Court confirms the election result of Mike Kennedy's election to Seat #2 on the City Council for the City of Coeur d'Alene in the November 3, 2009, Municipal election.

Counsel for defendant Kennedy may prepare an appropriate Judgment.

DATED this _____ day of October, 2010.

CHARLES W. HOSACK
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of October, 2010, that a true and correct copy of the foregoing was mailed/delivered by regular U. S. Mail, postage prepaid, interoffice mail, hand delivered or faxed as indicated below:

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DANIEL J. ENGLISH
CLERK OF THE DISTRICT COURT

DEPUTY CLERK