

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

Stacey C. Stone, Esq.
sstone@hwb-law.com
Molly A. Magestro, Esq.
mmagestro@hwb-law.com
HOLMES WEDDLE & BARCOTT, P.C.
701 W. Eighth Avenue, Suite 700
Anchorage, Alaska 99501
Phone: 907-274-0666
Fax: 907-277-4657

Attorneys for Intervenors/Cross-Appellants

IN THE SUPREME COURT OF THE STATE OF ALASKA

KATHRYN DODGE,

Appellant/Cross-Appellee,

v.

LT. GOVERNOR KEVIN MEYER, in his
official capacity as Lt. Governor for the
State of Alaska, and JOSEPHINE
BAHNKE, in her official capacity as
Director of the Division of Elections,

Appellees,

v.

BARTON LEBON and the ALASKA
REPUBLICAN PARTY,

Intervenors/Cross-Appellants.

Supreme Court No.: S-17301/17311

**INTERVENORS/CROSS-APPELLANTS' OPPOSITION TO MOTION
FOR ORDER TO CORRECT OR SUPPLEMENT THE RECORD**

OPPOSITION TO MOTION FOR ORDER TO
CORRECT OR SUPPLEMENT THE RECORD
Dodge v. Meyer, et. al.

Page 1 of 8
Supreme Ct No.: S-17301/17311

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

COME NOW Intervenors/Cross-Appellants Barton LeBon and the Alaska Republican Party (“ARP”), by and through their attorneys, Holmes Weddle & Barcott, P.C., and hereby oppose Appellant/Cross-Appellee Kathryn Dodge’s Motion for Order to Correct or Supplement the Record (hereinafter, “Motion”) on the basis that the materials Dodge seeks to add were developed and produced post-recount and are therefore not a part of the recount record to be furnished to the court by the Division Director under AS 15.20.510. A proposed order is lodged herewith.

The above-captioned and consolidated recount appeal concerns the November 30, 2018 recount of the votes cast and counted in the November 6, 2018 general election for the State House District 1 race between candidates Kathryn Dodge and Barton LeBon. During the course of the recount, the Director issued decisions determining what ballots and marks for candidates on ballots were valid, and to which candidate each vote should be attributed. On December 5, 2018, Dodge filed the underlying application, seeking judicial review of and to modify the decisions of the Division Director at the recount.

Election results may be considered by a court pursuant to AS 15.20.510, the recount appeal provision, and AS 15.20.540, the election contest provision.¹ Appellant Dodge filed an AS 15.20.510 recount appeal. The inquiry in a recount appeal is

¹ *Cissna v. Stout*, 931 P.2d 363, 366 (Alaska 1996).

whether specific votes or classes of votes were correctly counted or rejected.² The purpose is for the appellate court to review the decisions of the Director at recount regarding the counting or rejection of votes, to ensure compliance with the procedures set forth in AS 15.20.480³ and pertinent Alaska election law.⁴ Issues the Supreme Court has considered on recount appeals include “the validity of punch cards and a variety of marks on ballots, the proper procedures for absentee voting and consequences for failure to follow those procedures, and registration requirements.”⁵ However, the sole basis for the recount appeal is for the court to review the Director’s determinations regarding which ballots should be counted and for whom.⁶

As such, the inquiry in this recount appeal extends to the Director’s determinations related to the validity of ballots and ballot marks and her allocation of the votes at the recount, and the Court has the authority to set aside, modify, or affirm

² *Id.* at 367; *see also Willis v. Thomas*, 600 P.2d 1079, 1081 (Alaska 1979).

³ AS 15.20.480: In conducting the recount, the director shall review all ballots, [...] to determine which ballots, or part of ballots, were properly marked and which ballots are to be counted in the recount, and shall check the accuracy of the original count, the precinct certificate, and the review. The director shall count absentee ballots received before the completion of the recount. [...] The rules in AS 15.15.360 [which details the type of marks on ballots which are valid] governing the counting of ballots shall be followed in the recount when a ballot is challenged on the basis of a question regarding the voter’s intent to vote for the candidate [...]. The ballots and other election material must remain in the custody of the director during the recount, and the highest degree of care shall be exercised to protect the ballots against alteration or mutilation.

⁴ *Id.*

⁵ *Id.*; *see Finkelstein v. Stout*, 774 P.2d 786 (Alaska 1989) (residency, registration, absentee ballots); *Fischer v. Stout*, 741 P.2d 217 (Alaska 1987) (punch card ballots, residency, registration, absentee votes); *Hickel v. Thomas*, 588 P.2d 273 (Alaska 1978) (marks in boxes, punch card ballots); *Willis*, 600 P.2d 1079 (registration, absentee votes); *Carr v. Thomas*, 586 P.2d 622 (Alaska 1978) (punch card ballots).

⁶ *Willis*, 600 P.2d at 1082.

the action of the Director at recount.⁷ Pursuant to AS 15.20.510, the Director has the obligation to furnish the recount record to the court. The instructions of AS 15.20.510 are clear:

Upon order of the court, the director shall furnish the record of the recount taken, including all ballots, registers, and other election material and papers pertaining to the election contest. [...] The inquiry in the appeal shall extend to the questions whether or not the director has properly determined what ballots, parts of ballots, or marks for candidates on ballots are valid, and to which candidate or division on the question or proposition the vote should be attributed. The court shall enter judgment either setting aside, modifying, or affirming the action of the director on recount.

Thus, the Division Director's obligation here is limited to delivering all materials of the recount for the purpose of providing the court a complete record of all documentation and other materials which were considered in the determinations made therein. The Director must furnish the record of the recount taken, which includes all ballots, registers, and other election material considered therein. Documents and materials which were developed and derived after the recount are *ipso facto* not a part of the recount record.

Appellant Dodge has submitted Exhibit 1 to her Motion which includes affidavits Dodge seeks to add to the recount record that were developed and submitted to the Division Director after the recount. The affidavits were not provided to the

⁷ AS 15.20.510.

Director in advance of or at the recount, were not considered in the recount determinations which are the subject of this recount appeal, and as a result, are not a part of the recount record.

While the recount appeal involves a review of the Director's recount decisions under AS 15.20.480, the court itself is not limited to determining the facial validity of the ballots.⁸ The court has the authority to “search underlying records and election materials to ensure that a vote was cast in compliance with the requirements of Alaska's election laws.”⁹ This however, is limited in scope to underlying records and election materials and is the authority and power of the court reviewing the recount, not the obligation of the Division Director. Pursuant to precedent Alaska law, while the court has the ability to search and accept information regarding the validity of any ballot or vote, the Division of Elections is not tasked with the obligation of searching or collecting any such underlying records where the same was not a part of the recount. It is not the Director’s obligation to collect party work product and relevant evidence to support party allegations for submission to the court, as the Division Director has the limited obligation to furnish the recount record to the court pursuant to AS 15.20.510.

The Director provided all records and related materials from the November 30, 2018 recount on December 10 and 11, 2018, and as such, she has discharged her

⁸ *Cissna*, 931 P.2d at 367; *Willis*, 600 P.2d at 1082.

⁹ *Id.*

obligation under AS 15.20.510. Accordingly, Appellant's Motion for Order to Correct or Supplement the Record should be denied.

As a final note, Intervenors/Cross-Appellants further oppose Appellant's Motion on the basis that the materials provided at Exhibit 1 to the Motion had no bearing or significance on the Director's recount decisions, as the affidavits were not produced until after the recount decisions were already made (i.e., such residency information did not exist until the recount record was complete, the voters had valid registrations in House District 1 at the time of voting and through the date of the recount certification, and the voters only provided subsequent notice of an address change upon inquiry of Appellant's counsel post-recount in anticipation of this appeal).

Pursuant to AS 15.05.020(8):

The address of a voter as it appears on the official voter registration record is presumptive evidence of the person's voting residence. This presumption is negated only if the voter notifies the director in writing of a change of voting residence.

Pursuant to *Cissna v. Stout*:

As a practical matter, certain persons who move to a new district, but do not reregister or notify the election officials in writing of a change in residency, may have their votes counted in the district of their prior residency simply because election officials do not know that their residency has changed. In the interest of administrative efficiency, AS 15.05.020[8] allows the election official, in the absence of any written notification of change in residency, to presume that a voter still is a legal resident of the district in which he or she is registered. The statute is limited, however, to the circumstance where the officials have no

notification of a move to another district. Attorney General's Opinion No. 7 accounts for this limited circumstance.¹⁰

Pursuant to AS 15.05.020(8) and Alaska precedent, in the absence of advance written notification of change in residency, the Director's presumption that the voters identified in Appellant/Cross-Appellee's Motion were legal residents of House District 1, the district in which they were registered at the time they requested an absentee ballot, voted their respective ballots, signed the certification that all statements included therein were true, and submitted their ballots to the Division, was proper.

In accordance with the foregoing, Intervenors/Cross-Appellants respectfully request that the Court deny Appellant/Cross-Appellee's Motion for Order to Correct or Supplement the Record by issuing the proposed order lodged herewith.

DATED this 12th day of December, 2018, at Anchorage, Alaska.

HOLMES WEDDLE & BARCOTT, P.C.
Attorneys for Intervenors/ Cross-Appellants

By: _____


Stacey C. Stone
Alaska Bar No. 1005030
Molly A. Magestro
Alaska Bar No. 1605030

¹⁰ *Cissna*, 931 P.2d at 369.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December, 2018, a true and correct copy of the foregoing was sent via U.S. Mail and via e-mail to:

Patrick W. Munson, Esq.
Boyd Chandler Falconer & Munson LLP
911 W. Eighth Ave., Suite 302
Anchorage, AK 99501
PMunson@bcfaklaw.com

Thomas Amodio, Esq.
Reeves Amodio LLC
500 L St., Suite 300
Anchorage, AK 99501
tom@reevesamodio.com

Margaret Paton-Walsh, Esq.
Laura Fox, Esq.
Kate Demarest, Esq.
Alaska Dep't of Law – Civil Div.
1031 W. 4th Ave., Suite 200
Anchorage, AK 99501
margaret.paton-walsh@alaska.gov
laura.fox@alaska.gov
kate.demarest@alaska.gov

CC VIA E-MAIL:

Marilyn May, Clerk of the Appellate Courts
mmay@akcourts.us
mmontgomery@akcourts.us
sanderson@akcourts.us

Nancy McKewin, Judicial Assistant to Judge Aarseth
nmckewin@akcourts.us

By: 
Legal Assistant
Holmes Weddle & Barcott, P.C.

OPPOSITION TO MOTION FOR ORDER TO
CORRECT OR SUPPLEMENT THE RECORD
Dodge v. Meyer, et. al.

Page 8 of 8
Supreme Ct No.: S-17301/17311

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

Stacey C. Stone, Esq.
sstone@hwb-law.com
Molly A. Magestro, Esq.
mmagestro@hwb-law.com
HOLMES WEDDLE & BARCOTT, P.C.
701 W. Eighth Avenue, Suite 700
Anchorage, Alaska 99501
Phone: 907-274-0666
Fax: 907-277-4657

Attorneys for Intervenors/Cross-Appellants

IN THE SUPREME COURT OF THE STATE OF ALASKA

KATHRYN DODGE,

Appellant/Cross-Appellee,

v.

LT. GOVERNOR KEVIN MEYER, in his
official capacity as Lt. Governor for the
State of Alaska, and JOSEPHINE
BAHNKE, in her official capacity as
Director of the Division of Elections,

Appellees,

v.

BARTON LEBON and the ALASKA
REPUBLICAN PARTY,

Intervenors/Cross-Appellants.

Supreme Court No.: S-17301/17311

**[PROPOSED] ORDER DENYING MOTION FOR ORDER TO
CORRECT OR SUPPLEMENT THE RECORD**

ORDER DENYING MOTION FOR ORDER TO
CORRECT OR SUPPLEMENT THE RECORD
Dodge v. Meyer, et. al.

Page 1 of 3
Supreme Ct No.: S-17301/17311

This Court, having considered Appellant/Cross-Appellee Dodge's Motion for Order to Correct or Supplement the Record, all responses thereto, and being fully advised on the premises, HEREBY ORDERS:

Appellant/Cross-Appellee's Motion for Order to Correct or Supplement the Record is DENIED.

DATED this ____ day of _____, 2018, at Anchorage, Alaska.

HON. _____
Supreme Court Judge

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December, 2018, a true and correct copy of the foregoing was sent VIA U.S. Mail and via e-mail to:

Patrick W. Munson, Esq.
Boyd Chandler Falconer & Munson LLP
911 W. Eighth Ave., Suite 302
Anchorage, AK 99501
PMunson@bcfaklaw.com

Thomas Amodio, Esq.
Reeves Amodio LLC
500 L St., Suite 300
Anchorage, AK 99501
tom@reevesamodio.com

Margaret Paton-Walsh, Esq.
Laura Fox, Esq.
Kate Demarest, Esq.
Alaska Dep't of Law – Civil Div.
1031 W. 4th Ave., Suite 200
Anchorage, AK 99501
margaret.paton-walsh@alaska.gov
laura.fox@alaska.gov
kate.demarest@alaska.gov

CC VIA E-MAIL:

Marilyn May, Clerk of the Appellate Courts
mmay@akcourts.us
mmontgomery@akcourts.us
sanderson@akcourts.us

Nancy McKewin, Judicial Assistant to Judge Aarseth
nmckewin@akcourts.us

By: 

Legal Assistant
Holmes Weddle & Barcott, P.C.