

CAUSE NO. 2016-948-5

Maxine Barton

CORY PRIEST, CONTESTANT-PLAINTIFF	§ § §	IN THE DISTRICT COURT OF
v.	§	MCLENNAN COUNTY, TEXAS
KELLY SNELL, CONTESTEE-DEFENDANT	§ §	414 TH JUDICIAL DISTRICT

**PETITION FOR ELECTION CONTEST FOR
COUNTY COMMISSIONER PRECINCT 1,
MCLENNAN COUNTY, TEXAS**

TO THE HONORABLE JUDGE:

COMES NOW, Cory Priest, Contestant-Plaintiff, and files this Petition for Election Contest for the office of County Commissioner Precinct 1 of McLennan County, Texas against Kelly Snell, Contestee-Defendant, and in support of this contest would show the Court as follows:

**I.
DISCOVERY**

1. Contestant intends to conduct discovery under Level 3 of the Texas Rules of Civil Procedure 109.4.

**II.
PARTIES**

2. Cory Priest, Contestant-Plaintiff, is a resident of McLennan County and County Commissioner Precinct 1. He ran for the office of County Commissioner Precinct 1 in the Republican Primary in the March 1, 2016 Republican Primary Election.

3. Kelly Snell, Contestant-Defendant, was also a candidate for the office of County Commissioner Precinct 1 in the Republican Primary in the March 1, 2016 Republican Primary Election. Service of this suit may be made by on Contestee-Defendant serving Kelly Snell at the office of County Commissioner Precinct 1 at 215 North 5th Street, Suite 125, Waco, McClennan County, Texas. Contestee-Defendant is required to file an answer to the petition not later than

10:00 a.m. of the fifth day after the date of service of citation Tex. Elect. Code § 232.012 and 232.008(c).

4. A copy of this petition is being delivered by certified mail to the Texas Secretary of State pursuant to Tex. Elect. Code § 232.008(d).

III. JURISDICTION AND VENUE

5. Jurisdiction and venue are proper and mandatory in McLennan County pursuant to Tex. Elect. Code § 232.006(c).

IV. FACTS

6. County Commissioner Precinct 1 is located entirely within McLennan County.

7. The Republican Primary for County Commissioner Precinct 1 was held on March 1, 2016.

8. Both Cory Priest and Kelly Snell were candidates in the Republican Primary for County Commissioner Precinct 1.

9. After the closing of the polls on March 1, 2016, the County Clerk counted the votes for County Commissioner Precinct 1. The reported vote was Kelly Snell, 3068 votes and Cory Priest, 3039 votes. After the military ballots were counted, the vote total was Kelly Snell, 3069 and Cory Priest, 3039.

10. Almost immediately after the election, Kathy Van Wolfe, McLennan County Election Administrator, discovered that there were over 600 mistakes made in the administration of Election Day voting by the local precinct election officials. Ms. Van Wolfe prepared a memo detailing the mistakes, a copy of which is attached hereto as Exhibit "A." The mistakes made by the local precinct election officials are as follows:

First Assembly of God Church polling location:

- Election officials gave ten (10) voters who did not live in Commission Precinct 1 ballots which contained that race and they were allowed to vote in that race.

- Election officials did not give ballots containing the Commissioner Precinct 1 race to ninety-three (93) voters who live in Commission Precinct 1 and were entitled to vote in that race, thereby disenfranchising the voters.

Mart Community Center polling location:

- Election officials allowed three (3) voters to vote in the Commission Precinct 1 election who did not live in that district.

Cesar Chavez Middle School polling location:

- Election officials allowed three (3) voters to vote in the Commissioner Precinct 1 election who did not live in that district.

Fellowship Bible Church polling location:

- Election officials gave incorrect ballots to forty-six (46) voters, who should have voted in the Commissioner Precinct 1 race, thereby disenfranchising those forty six voters.

11. In summary, Sixteen (16) voters were allowed to vote in Commission Precinct 1 election who should not have been allowed to vote in that race; one hundred and thirty nine (139) voters should have been allowed to vote in the Commission Precinct 1 election, but were disenfranchised

12. On March 3, 2016, Cory Priest filed a petition for recount with the McLennan County Republican Party. The Party accepted the recount petition on March 6, 2016 and a recount occurred on March 9, 2016.

13. Following the recount, the Republican Party accepted the revised vote total showing Kelly Snell with 3059 votes and Cory Priest with 3034 votes, for a difference of 25.

**V.
CONTEST**

14. This election contest is timely brought in accordance with Tex. Elect. Code § 232.008.

15. On March 8, 2016, eight days after the primary election, Ms. Van Wolfe received an email from Hart Inter Civic regarding, the voting machine software operator, warning election officials that "... an error can sometimes occur in a polling place with multiple precincts available is that voters may accidentally be given the incorrect ballot style (or precinct)". Attached to the email is a memo from Hart Inter Civic stating that ACOP should be used "for Early Voting only" and not for Election Day voting. A true and correct copy of the email and memo are attached hereto as exhibits "B" and "C", respectively.

16. This election contest is timely brought in accordance with Tex. Elect. § 232.008.

17. Contestant, Cory Priest, asserts that the true outcome of the election cannot be ascertained because:

a. Sixteen illegal votes were counted in Commissioner Precinct 1 race; and

b. Election officials made too many mistakes which disenfranchised at least 139 voters in the Commission Precinct 1 race.

PRAYER FOR RELIEF

18. The allegations of non-compliance with the Texas Election Code cumulatively and materially affect the outcome of this race. In light of the legal irregularities and in order to preserve the integrity of the voting process, Contestant Cory Priest requests and prays that:

a. the court declare the McLennan County Republican Primary Commission Precinct 1 held on March 1, 2016 to be void;

- b. order that a new election be held to ascertain the true will of the voters in Commission Precinct 1 pursuant to the Texas Election Code;
- c. assess the cost of this election contest against McLennan County;
- d. order that a new election be held on the day of the Republican Primary run-off election on May 24, 2016;
- e. make such further Orders which are necessary to effectuate the election being held on that date; and
- f. that Contestant have such further relief, both general and special, at law or in equity, to which he may show himself entitled.

Respectfully submitted,

BEIRNE, MAYNARD & PARSONS, L.L.P.

By: /s/ Joseph M. Nixon, Jr.

Joseph M. Nixon, Jr.

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ATTORNEYS FOR CORY PRIEST

EXHIBIT A

INCORRECT BALLOT – ELECTION DAY – JOINT PRIMARY ELECTION - MARCH 1, 2016

First Assembly of God Church – March 1, 2016 Election Day

606 - Voters received the incorrect Precinct for their ballot in relation to Commissioners' contests

203 - Voters did not have either Commissioner Pct. 1 or Pct. 3 on the incorrect ballot that they were given, and these voters would not have voted for a Commissioner in this election cycle, even if they were given the correct precinct ballot. Their Commissioner was not up for reelection. **203 votes did not affect either Commissioner's outcome because the voters did not and should not have voted in either Commissioner's contest.** – Ballot Style 2

10 - These voters should not have a Commissioner on their ballot but they were allowed to vote for Commissioner Pct. 1 on their incorrect ballot. Ballot Style 3

92 – Voters did not get to vote for Commissioner Pct. 1 – Ballot Style 4

295 – Voters did not get to vote for Commissioner Pct. 3 – Ballot Style 5

1- Voter did not get to vote for Commissioner, Pct. 1 – Ballot Style 6

5 - Voters did not get to vote for Commissioner, Pct. 3 - Ballot Style 7

REVIEW OF INCORRECT BALLOTS AT FIRST ASSEMBLY OF GOD CHURCH

Commissioner Pct. 1 – (92 voters Ballot Style 4 plus 1 voter Ballot Style 6 for a total of 93 voters) If you include the 10 voters who should not have voted for Commissioner Pct. 1 but got a ballot with Commissioner Pct. 1 on it with the 93 voters who did not get to vote for Commissioner Pct. 1, then there was a total of **83** possible votes that would have been cast for Commissioner Pct. 1.

Commissioner Pct. 3 – (295 voters from Ballot Style 5 and 5 Voters from Ballot Style 7 for a total of 300) 300 voters who did not get to vote for Commissioner Pct. 3 are not enough to overturn the results of the election for Commissioner Pct. 3.

Although the incorrect ballot also affected State Representative, District 12 contested race, the 606 votes are not enough to overturn the results of the election for State Representative, District 12.

Mart Community Center

3 - These voters should not have a Commissioner on their ballot but they were allowed to vote for Commissioner Pct. 1 on their incorrect ballot.

Cesar Chavez Middle School

2 - Voters did not have either Commissioner Pct. 1 or Pct. 3 on the incorrect ballot that they were given and these voters would not have voted for a Commissioner in this election cycle, even if they were given the correct precinct ballot. Their Commissioner was not up for reelection. **203 votes did not affect either Commissioner's outcome because the voters did not and should not have voted in either Commissioner's contest.**

3 - These voters should not have a Commissioner on their ballot but they were allowed to vote for Commissioner Pct. 1 on their incorrect ballot.

1 – Voter should have been allowed to vote for Commissioner 3 but the race was not on their incorrect ballot.

Fellowship Bible Church reported they gave out **46** incorrect ballots but since their paperwork had both the precinct number and the ballot style number written on the labels, there was no way to determine which voters received the incorrect ballot.

EXHIBIT B

From: Kathy Vanwolfe <kathy.vanwolfe@co.mclennan.tx.us>
Sent: Thursday, March 10, 2016 7:08 AM
To: Trainor, Trey; Nixon, Joe; donna@dgdlawfirm.com
Cc: 'Mike Dixon'
Subject: FW: Reminder: Hart Knowledge Base Article 22 - Access Code on Demand

Trey Trainor requested a copy of this email that I received from Hart InterCivic on Tuesday, March 8, 2016.

From: Hart Support [<mailto:hartsupport@hartic.com>]
Sent: Tuesday, March 08, 2016 1:49 PM
To: Hart Support
Subject: Reminder: Hart Knowledge Base Article 22 - Access Code on Demand

Dear Texas Hart Election Partners,

As convenience voting options like Vote Centers become more common in Texas, an error that can sometimes occur in a polling place with multiple precincts available is that voters may accidentally be given the incorrect ballot style (or precinct). To avoid this error, Hart has a product we call "Access Code On Demand" (ACOD) for the Hart Voting System. ACOD works with Hart's ePollBook to print a 2D barcode label that contains the precinct ID for the voter posted in the ePollBook. That barcode is then scanned with a scanner attached to Hart's JBC in order to print an Access Code that will match the voter's precinct (and ballot style) from the ePollBook.

The purpose of the attached knowledge base article is to remind ACOD users of best practices for the use of ACOD. If you do have Hart's ACOD tool we are sending this to you so that you can apply the best practices presented, including setting up your Primary runoff election correctly (as a General with splits for the parties) if you use ACOD.

Sincerely,

Customer Support Center
Hart InterCivic
15500 Wells Port Drive | Austin, TX | 78728
(866) 275-4278
HartSupport@hartic.com | www.hartintercivic.com

EXHIBIT C

The Hart Voting System & Access Code On Demand

As convenience voting options like Early Voting and Vote Centers become more common, an error that can sometimes occur in a polling place with multiple precincts available is that voters may accidentally be given the incorrect ballot style (or precinct). To avoid this error, Hart has a product we call "Access Code On Demand" (ACOD). Access Code on Demand works with Hart's ePollBook to print a 2D barcode label (similar to the image at right) that contains the precinct ID for the voter posted in the ePollBook. That barcode is then scanned with a scanner attached to Hart's JBC in order to print an Access Code that will match the voter's precinct (and ballot style) from the ePollBook.



Example 2D Bar Code

When using ACOD, there are some important items to keep in mind. If you do not layout your own ballots, but use Hart's Ballot Production Services (BPS), make certain that your service representative is aware that you are using ACOD and want your database set up to work with ACOD.

The purpose of this knowledge base article is to provide ACOD users with some best practices for the use of Access Code On Demand.

Important Notes on the use of Access Code On Demand

During ballot programming and layout in BOSS follow the best practices below:

1. PRIMARY ELECTIONS

- a. Use ACOD for Early Voting only.
- b. BOSS Election Type "Closed Primary" or "Modified Closed Primary" can be used.
- c. Party Codes must NOT be altered with pipes(|), including the nonpartisan party code "NP".
- d. The default nonpartisan party code (NP) must not be renamed or changed in any way.

2. NON-PRIMARY ELECTIONS

- a. BOSS Election Type "General" and "Special" are used, as usual.
- b. Party Codes must NOT be altered with pipes(|), including the nonpartisan party code "NP".
- c. The default nonpartisan party code (NP) must not be renamed or changed in any way.

For all election types, follow the guidelines below if processing provisional voters from the JBC and using ACOD.

1. If a voter requires a provisional ballot, add the provisional voter manually at the JBC as usual. Do not scan a bar code with ACOD for a provisional voter. (See your Desk Reference for steps for adding a provisional voter at the JBC).
2. After adding a provisional voter, and printing his Access Code and Provisional Slip, clear the JBC by pressing Add Voter, selecting a precinct (if more than one precinct is available) and then pressing Cancel. You will be back on the "Add Voter" screen of the JBC and ACOD will be ready for use.

If you have any questions regarding these procedures, please contact the Customer Support Center at 866-275-4278.