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MINUTES OF THE House COMMITTEE ON Select Committee on Election Contest.

The meeting was called to order by Bill Roy at 1:00 p.m. on January 22, 1991 in Room 254-E of the Capitol.

All members were present except: All present

Committee staff present: Pat Mah, Legislative Research
Arden Ensley, Revisor of Statutes
Jeanne Eudaley, Committee Secretary

Conferees appearing before the committee:

Karlen Christensen-Jones, Contestant
Victor Miller, Attorney for Jones
Rep. Elaine Wells, Contestee
Ron Hein, Attorney for Wells

Others attending: See attached list

Chairman Roy introduced members of the Committee and staff and announced the Court case, Karlen Christensen-Wellman, aka Karlen Christensen-Jones, Contestant vs. Elaine Wells, Contestee. Chairman Roy prefaced the hearing and said he was disappointed that discussions among committee members, press and others were referring to this case as a partisan matter. He went on to say that he hoped members of the committee would view each issue presented individually and that the Committee consider all matters open minded and in a fair way. He urged the Committee to conduct themselves in such a way to retain the integrity of the election process and be accountable to the people who elected them.

He referred to the Rules of the Committee adopted in its first meeting (Attachment 1) and announced that in conformance with Rule 1, the Committee will hear from the Contestant and Contestee and their respective counsels. Each committee member should have received a listing of the ballots that are at issue and he said the members could ask questions as the Committee proceeds with its deliberations. He announced the Committee would first hear from the Contestant and a response from the Contestee and rebuttal from the Contestant would follow. He then recognized Karlen Christensen-Jones, who gave a statement (Attachment 2) to the Committee. She then introduced her attorney, Vic Miller.

Mr. Miller began presenting the Contestant's case and referred to a list of ballots (Attachment 3), which the Contestant intends to place in issue. He requested that the ballots be given to the Committee to view as he discussed each one individually. In brief remarks, Mr. Miller said he wanted to tell the Committee how he approached this problem, and referred to a remark by a Committee member at the previous meeting that it ought to be as easy as getting in a room, counting the ballots and declaring a winner. He said he thought it would be easier to devise a system whereby the names of the parties on the ballot were covered so that all that needed to be analyzed was the casting of the ballot, with disregard as to whom it was casted. He commented that all parties have probably wondered just what course the trial would have taken had it not known the outcome of the issues and questions. He said

they have tried to be consistent in approaching the questions.

Mr. Miller said that on Election Day, November 6, the first count revealed a total tally of 6,937. Jones was declared the winner with 11 votes to her favor. The second tally gave a total of 6,950 votes, and Wells winning by 2 votes. Even though the Judge threw some ballots out, because he considered they were not valid, he counted 6,965 votes. He cautioned to keep in mind that this count was under close scrutiny and were hand counted and yet, he counted 15 more ballots over the second count. He said the Committee has difficult decisions to make, and that the Judge had difficult decisions to make during the trial.

Rep. Solbach asked if the 13 ballots found between the first and second count were all for Jones, and Mr. Miller answered that Jones' count did not change between the first and second count. Mr. Miller went on to point out the confusion of names, with the Contestant's name being Karlen Christensen-Wellman at that time. He stated that he believes this Election case is one that should be in front of the Supreme Court of Kansas so that they can address the multitude of legal issues that arise when we use the system we use, particularly when paper ballots are used that can be subject to so many interpretations. He stated that he intended to go through his list of ballots and try to speak to the issues by raising those ballots, and in doing so, he will refer to ballots raised by counsel for the Contestee. Mr. Miller asked the Committee to look at Ballot #552, which is an absentee ballot which had been torn and taped. The following is his explanation of that ballot:

Ballot #552 - referred to Statutes K.S.A. 25-3002(b) (3), 152 K.S.A. 63, Pg. 79, GS 1935, 25-419. Refers to mutilated and torn ballots. Statute is unjust and unfair; intention of voter is clear. Limiting language needs to be changed.

Question: Rep. Sawyer - Was original ballot counted? Mr. Miller - Yes, he thinks the original was counted. Mr. Miller asked Chairman Roy if the Trial Transcript had been received. Rep. Roy said, "No". Mr. Miller emphasized the problem of trying to recall information and not having the Transcript available for reference. He recalled the Judge indicated he could make no finding based on the evidence as to whether the tear was caused by an election official or the voter. The election official recalls a ballot being torn by a machine and a repair project, but she could not say if this was the ballot. Statute is unclear and unjust and should be changed. Clarification to Chairman Roy, it appears that Ballot #552 was counted, since it was an Absentee ballot, one must reconcile the Absentee lists.

Question: Rep. Shallenburger acknowledged the ballot was taped, but asked Mr. Miller if it was torn, what the intent of the law regarding identifying marks and defacements is as it pertains to this particular ballot. Mr. Miller replied that the Judge ruled it was torn and he believes that also. He cited language from an Ohio statute regarding identifying marks and said he believed that the tear was not considered an identifying mark nor a defacement. Rep. Shallenburger also asked about technical errors and the adoption of that statute. Mr. Miller went on to explain court rulings dealing with marking ballots with a different color and other technical errors and how that relates to the Judge's rulings in this case.

Mr. Miller went on to call attention to ballots at issue by the Contestee which will be discussed later. He went on to explain that Lyon County utilizes an optical scanner to count votes and cited statutes, and in particular K.S.A. 25-4607, 25-4608 and 25-4609, passed by the 1982 Legislature, which pertains to the use of optical scanners. Mr. Miller showed an optical scanner to the Committee. In pulling the ballots from the optical scanner, an election worker must tear the top part away; consequently, many of

the ballots have a tear at the top. Rep. Shallenberger asked Mr. Miller why the Legislature passed the "torn ballot law". Mr. Miller said he did not know, that it was a stupid law.

Ballot #492 and #493 - Judge ruled these ballots mutilated. He explained the fashion in which the election worker clips the number from the corner, after the ballot is marked and handed to the worker. In the case of these two ballots, another part of the ballot was clipped in that process, then taped back on the ballot. Mr. Miller again told how he needed the Transcript for reference, then went on to tell the Committee that the Judge ruled these ballots clearly mutilated. The statute gives no definition for "mutilation", but he went on to give Black's dictionary definition, which is "rendering a document imperfect", and another definition which defines mutilation as "subtracting from the document". He referred to five other ballots, which were votes for Wells, which the Judge ruled as "not mutilated". He admitted he failed to cite the "torn ballot statute" and its history and intent during the court case and reminded the Committee that the statute had been repealed, but said it was irrelevant because of the Judge's Ruling that these ballots were clearly mutilated.

Rep. Sawyer asked Mr. Miller to repeat the numbers of the five ballots referred to above and as Mr. Miller was reciting the numbers, Mr. Hein objected to bringing these five ballots before the Committee since it had been agreed upon to discuss only those ballots listed as "at issue". Mr. Miller said he believes these ballots should be counted, including the five ballots in question for the Contestee, and the two ballots he is presently discussing. An argument ensued, with Mr. Miller saying he is trying to be consistent in arguing which ballots should be counted. Mr. Hein asked the Chairman what the standard of review is because Mr. Miller is now raising additional questions and bringing forth additional material not introduced in Court. Chairman Roy stated he would like to adhere to the Rules agreed upon and the ballots at issue but understands that may bring other ballots for discussion because of similarities and reminded both attorneys that this is not the Court but a Legislative Committee. Mr. Hein stated he would like some guidance from the Chairman and just wants to know the rules we are playing by. Rep. Solbach reminded Mr. Hein that in the Legislature there is no burden of proof and no rules of evidence and that this is not a Court of Law. He went on to say he hoped they all would be fair and allow time for everyone to present their case to the Committee. Mr. Hein said he had read K.S.A. 2514-51 and it is not that clear to him. He sees, specifically that the Legislature can set aside findings, that the Judge may make only one finding and that is the number of lawfully cast ballots. He went on to say they have had no guidance, or even if the Select Committee has the authority to make these determinations, whether it is an appellant proceeding or not. Chairman Roy stated that in many ways committee work was advisory only and did not bind the membership of the House.

Rep. O'Neal said he wanted to ask a question regarding mutilated ballots and being consistent, but that we need to set the Rules to govern ourselves. To Mr. Miller, he asked about the torn, mutilated ballots and the divets. Mr. Miller said there is another ballot - #445 - where the piece doesn't match the divet. Rep. O'Neal asked Mr. Miller what his position on the other ballots was and the number of those ballots. Mr. Miller answered there are eight of them, and according to the definition, these do not appear to be torn and went on to discuss the problem of defining "torn". Rep. O'Neal reverted back to the Rule question and stated that we need to be consistent and agree to the Rules, otherwise, we will look stupid. He stated that even though anyone could do whatever they want, we need to recommend a quality product out of this Committee and we all need to play out of the same Rule book. Mr. Miller cited a Supreme Court case, and Rep. O'Neal says it is irrelevant what a case or the court says, that we need to be consistent and not follow the letter on one issue and do whatever

we wish on another.

After discussion regarding Rules, Rep. Solbach reiterated that the Committee should follow the Rules, with Rep. Snowbarger agreeing, and further saying, he is fearful that the Contestant and Contestee may view this proceeding as an extension of the Court, which it is not. Rep. Solbach asked for further clarification on the terms, "mutilated, torn, defaced". Mr. Miller said that "mutilated" is an undefined term and has been added to the statute he referred to earlier. Discussion continued with clarification on marking or mutilation of the voting box, and Mr. Miller pointed out that the two bills in question are clearly mutilated, but that the Judge read into the statute Legislative intent that is nonexistent.

In answer to a question on a number of votes from Rep. Snowbarger, Mr. Miller said the number of votes is fluid and used as an example, when you recount a precinct and Wells gets 3 more votes and Christensen-Wellman (Jones) gets 3 less, I can't tell you which votes they counted the first or second time, or if they switched. I wasn't there for either count. Chairman Roy said they both had holes in the middle, which indicates they were strung and counted. Rep. Snowbarger asked if there were any other ballots torn or clipped with divets in Osage County. Upon looking it up, Mr. Miller answered "No, there were no others". Rep. Snowbarger clarified that these are the only two diveted ballots from Osage County. Rep. Snowbarger asked if they could assume the same pieces were taped on the ballot that were originally clipped from the ballot. Mr. Miller clarified that Ballots No. 461 to 493 in Osage County, Fourth Ward, were ballots pulled as "contested" by the Board of Inspectors. He went on to point out that there were 651 ballots that the Board of Inspectors pulled, and we got together afterward and agreed there were 62 legitimate ballots that we cannot agree on, and those matters were litigated before the Court and the Court made individual findings. The number of the ballot we refer to was placed there by the Board of Inspectors as they reviewed ballots from precinct to precinct. They kept them in precinct order so that as you go through, you flow through an entire precinct before you go to another one. The Osage County ballots run through 533 and pick up in Lyon County from 534 to 650.

Rep. Shallenburger asked if Mr. Miller knew if the ballots had been counted the first time, and he answered he assumed they were. Rep. Shallenburger asked if they keep ballots not counted in a separate place, and Mr. Miller said they are supposed to and said a critical point had been raised here that involves what has been learned out of this case, and that is Election Boards do not receive very good instruction as to how to treat ballots. More often the exception rather than the rule is they did it correct. Mr. Miller was asked if the Judge counted the ballots in question, and he answered that he did. The Judge said he saw Legislative intent as it relates to actions by the voter. Rep. Snowbarger clarified that the Judge has counted it and the Board has counted it, and Mr. Miller agreed. He added that the saddest thing is that this is not the first time it has happened. He then referred to the 1986 Primary Election when Rep. Jerry Friedeman and Rep. Mead were in the same situation, and one particular precinct clipped an additional part of the ballot on every single ballot in that precinct. Fortunately, they resolved the matter; notwithstanding that, the really sad thing is that the Legislature did nothing about it. We think it is high time the Legislature did something about it.

Chairman Roy announced that the Contestee has a witness to testify, and that will be at 3:30.

Regarding Ballots #492 and #493, Mr. Miller read from Supreme Court Docket No. 64,669 and read that statute to the Committee.

Ballot #153 - ballot bears an improper identification mark. (Similar to Ballot #100). Mr. Miller pointed out that the number "32" in the upper right hand corner, which is the number to

identify the ballot, was not clipped by an Election worker. He went on to say there are two reasons why this might have happened: (1) Negligence on the part of the Election worker - just failed to clip the number before depositing ballot in the box; (2) Voter put the ballot directly in the box without handing it to Election worker. Mr. Miller referred again to the Australian Ballot Law, which states that you must mark a cross inside the box with no other marks on the ballot, and the rigid application of the law and cited several cases. He also referred to Judge Wheeler's Memorandum Decision and Judgment (Attachment 4), Page 31. Mr. Miller went on to explain the law dates back to the days when people were paid to vote for a certain candidate, thereby causing statutes dealing with identifying marks and rigid application of the statute. Application of that statute is not as relevant today as it was then.

Mr. Miller went on to explain Ballot #100, which ballot has two errors and the voter marked out the first vote, initiated it (as is done with legal documents) and voted for the other candidate. Mr. Miller stated that the Judge ruled against them on both ballots. They verified this with the voter.

Question - Rep. Sawyer asked why Ballot #153 wouldn't be counted, since that is a way to identify and control ballots and a method to keep track of ballots. Mr. Miller went on to point out the relevance and degree of what is considered to be an identifying mark and intentional marking of ballots, which relates to the crime of intentionally marking ballots. He also pointed out that in the case of Ballot #153, the voter has an obligation to make sure his ballot is clipped and put in the ballot box. Or, as he stated before, the voter could have put the ballot directly in the ballot box.

Question - Rep. Snowbarger asked if #153 was counted by everyone, and Mr. Miller indicated it was counted by everyone including the Judge. He also asked if #100 was counted by everyone, and Mr. Miller stated Ballot #100 was counted by everyone, including the Judge, who reversed his findings in his Memorandum Decision and Judgment.

Question - Rep. O'Neal asked if numbering ballots (by Election workers) did not constitute an identifying mark and discussion followed regarding vote validation and the opportunity extended to the voter to re-vote. Mr. Miller went on to explain the difference in the statutes between torn and mutilated ballots and ballots with identifying marks. Statutes referred to regarding numbering ballots is K.S.A. 25-2908 and identifying mark - K.S.A. 25-2902. Mr. Miller admonished that the Legislature should not have removed the qualifying language "by the voter".

Question - Rep. Solbach referred to K.S.A. 25-2902, which clearly states that if there are marks on the ballot, it should not be counted. He pointed out that if a voter accidentally makes a mark on the ballot, the voter may re-vote. Mr. Miller commented that inadvertent marks are not considered identifying marks.

Question - Rep. Shallenburger - Regarding secrecy of the ballot, as far as I am concerned, numbering ballots is a violation of my rights, but if I inadvertently make a mark on my ballot, that does not constitute an identifying mark. Mr. Miller went on to explain that the statutes being discussed were passed to protect the integrity of the system and to eliminate manipulated elections, referring to the Australian Law. However, with the many exceptions added to the statute, it renders the statutes moot.

Chairman Roy announced that the Contestee's attorney, Ron Hein, had a witness to speak to the Committee. Mr. Hein asked if the Committee wanted an oath administered to the witness, and the Chairman administered the oath.

Witness, Mary Jo Hodge testified that she and her husband reside in Osage City. His name is William E. Hodge, and he is serving in Saudi Arabia with Operation Desert Shield. He is with the 190th Air National Guard and has been gone since August 10, 1990. He has not been home since that date. Her husband requested an absentee ballot from the Osage County Elections Office and upon her receiving the absentee ballot and packet, she took it to Forbes and gave it to Captain Steve Rextor. She testified that it was necessary to fax the absentee ballot to him because the ballot and packet had missed its flight, and the only way her husband could vote was to fax it to him. Subsequently, when she returned from work one day, the envelope was laying on the table; she stuck the ballot into the proper envelope and signed it (she has power of attorney from her husband). She then put it in the mail to the Elections Office. She further testified that she thought the ballot had been counted and as far as she knew the envelope had arrived and had been counted. She went on to say how important it was to her husband that he vote in this Election. The envelope and all election papers were returned to the office of the 190th Air National Guard, and they returned them to Mary Jo Hodge.

Mr. Miller, Attorney for Contestant, Karlen Christensen-Jones, then asked the witness several questions. He asked her if she knew who or why the ballot was returned to her. She answered that she did not know why they were returned, or who returned them; she was not home at the time, and her son did not know who the person was or who left the papers. Mr. Miller asked Ms. Hodge what she did with the papers, and she responded that she took them to the Election Office and told them what happened. Mr. Miller apologized for the incidence and asked her if she knew how and why the ballot (#528) was returned and who returned it. She responded that she was not home and was not sure who returned the ballot, that she did not know what ward they were in. She responded to additional questions, reciting answers as testified to above. Mr. Miller asked her if the fax sheet indicated the number of pages being faxed, and she responded, "4". Mr. Miller asked Ms. Hodge to tell her husband that we are proud of him.

Mr. Miller resumed explaining ballots at issue, with the following ballots:

Ballots #59, #156, #166 - Referred to K.S.A. 25-3002 (b)(1). Mr. Miller pointed out that issues surrounding these ballots look to the intention of the voter rather than findings of fact as has been previously discussed and was at the discretion of the Judge.

Mr. Miller called the Committee's attention to each of the above three ballots and the variety of markings on them and said it is impossible to determine the voter's preference on all three ballots. After viewing the above three ballots, Rep. Snowbarger commented that it appeared all three had been strung and asked Mr. Miller if that meant all three had been counted. Mr. Miller believes they were counted in the Recount and went on to give information which was hearsay, at which point Mr. Hein objected. After answering questions from Rep. Solbach and Rep. Snowbarger, Mr. Miller stated that the Election Board and Judge counted all three ballots for Wells.

Ballots #529, #530, #531, #533 - All Absentee ballots from Osage County which the Affidavit is not completed or has not been signed, or both. Mr. Miller cited several cases relating to the Absentee Affidavit information and whether that is mandatory. He also called attention to Judge Wheeler's Memorandum Decision and Judgment, Pages 12 through 20. The Supreme Court has ruled that is mandatory information for a valid ballot, and the Judge has ruled that the ballots should be counted. Mr. Miller further explained that these ballots remained sealed in a Challenged envelope until after evidence was presented in the Court case. In noting the relevance of the number of votes for each candidate, Chairman Roy stated two ballots for Wells and two for Christensen-

Jones and the Committee should proceed for lack of relevance. Mr. Miller objected and explained there are other Absentee ballots which are effected by how the Committee views the four ballots being discussed.

Counsels were asked if they would stipulate to the above four ballots, and Mr. Hein said that Mr. Miller had originally refused to stipulate on the four ballots in question, but then he changed his mind at the time of the Trial to stipulate them and now he is coming to this Committee and states he now doesn't want you to count them. Mr. Miller objected again to the fact that a Transcript is not available and vehemently objected to Mr. Hein's statements and flatly denied he had ever stipulated the four ballots in question. He stated that he would rest on his record.

Discussion ensued regarding the importance of further discussing the four ballots at this time, and Rep. O'Neal suggested the Committee remain moot on the four ballots. Mr. Hein referred to a Supreme Court Case which made a distinction in that some of the information was completed on the Affidavit and its importance in determining if it was a valid ballot. In particular, Ballot #529 - the Affidavit was completed by an employee in the Election Office since the voter was known to the Election Office employee. Mr. Miller stated the four ballots could be distinguished for a number of reasons and went on to point out those differences. He said that his position has always been that all five ballots should not be counted and that he hoped the Legislature would consider legislation which would deal with this question and pointed out that this is commonplace - the large number of unsigned Affidavits accompanying Absentee ballots in each county. He continued by saying that to eliminate questions of fraud, that Affidavit must be signed - if it is not signed, then it is not a valid ballot. Rep. Solbach asked for clarification on the Affidavit question, since there are more than one Affidavit required for each Absentee ballot. Mr. Miller explained the difference of the Voter Affidavit from the Affidavit of Assistance, and Mr. Hein again stated that Mr. Miller has changed his position on the four ballots.

Mr. Hein asked Chairman Roy if the Committee would hear testimony from Rep. Bob Mead, 112th District. After discussion, the Committee agreed to hear a statement from Rep. Mead.

Mr. Hein stated that this is a relevant case which would be further explained in his presentation. Chairman Roy administered the oath, and Mr. Hein asked Rep. Mead about circumstances following the election in 1986. Rep. Mead stated that upon counting the ballots, Election workers found over 100 ballots which had been damaged when the number in the right-hand corner of the ballot was clipped and another part of the ballot was clipped also. Rep. Mead testified that the only race affected was that of Representative of the 112th District and that a law suit was filed, Jerry Friedeman vs. Coleen Murphy, et al, Barton County District Court Case No. 86C438, and as a result of that law suit, a Special Election was held to determine the winner. Mr. Miller asked Rep. Mead if there were other races affected as a result of the damaged ballots, and he answered there were no others affected.

Mr. Hein requested secrecy of the ballots, and Mr. Miller stated that both counsels would like to request secrecy of the ballots. He made the statement that only the Absentee ballots in question could be traced to the voter and that any challenged ballot has to be opened by the Election Board and others to determine the validity of the ballot. It was agreed that the ballots will be kept secret by the Committee and staff.

Ballot #122 - In explaining circumstances surrounding this ballot, Mr. Miller explained this was a first-time voter who drove from college to cast her ballot Election Day and went to the Election Office where she registered. She testified that she had not received a registration card from the Election Office, but had been

away at college. When she arrived at the Election Office to vote, she was told she was not a registered voter, that she must go to her proper precinct to cast her ballot. Since she had not seen her registration card, she did not know her precinct or voting place. The Election office did not give her that information, and told her the only way she could vote at that office was to cast a Challenged ballot, which she did. Mr. Miller cited several statutes and in particular, Kimsey vs. Board of Education and K.S.A. 25-2506(b), as well as the statute relating to Challenged ballots, K.S.A. 25-409. He also pointed out that Election officials did not administer the oath, as required, and said that the statutes require a voter must vote in his/her precinct. He commented that it would be opening pandora's box to allow voters to pick and choose where to vote, as pointed out in Kimsey vs. Board of Education. Discussion centered around lack of information from Election officials as to where she should vote and the fact that Election officials failed to administer the oath. Committee members pointed out intent to vote, her lack of information as to where to vote and failure on the part of Election officials.

Rep. Snowbarger read from Judge Wheeler's Memorandum Decision and Judgment, which stated that the voter had originally been assigned the wrong precinct and that later on that error was corrected by Election officials. Further discussion centered around the confusion of changing precincts and lack of information on the part of both the voter and Election officials. Mr. Hein stated he will discuss this ballot later and present additional information.

Ballots #426, #427 - (Ballot #427 did not vote for either candidate from the 59th District). Both of these ballots were discovered by the Osage County Recount Board in a manila envelope which read that it contained two national and state ballots not voted. This manila envelope was found within a larger gray envelope, a storage envelope for "void, objected to and challenged ballots". Both ballots had been clipped but not strung indicating they had not been counted but treated as void, objected to, or challenged ballots. The judge found that the Election Board did not follow procedures for handling and marking either ballot as an "objected to" or "challenged" ballot. Mr. Miller stated that no Election officials were called to testify, but that he had talked to three of them and none of them could remember the ballots nor the circumstances surrounding them. Judge Wheeler ruled that the ballots should be counted. Rep. Solbach asked if the ballots could have been slipped in after the recount, and Mr. Miller replied that probably was not the case. Rep. Shallenberger said he thought each ballot had to be accounted for by Election officials, and Mr. Miller said the Election officials marked these ballots as "not voted" and thought the ballots were blank. However, when the envelope was opened, it was found to be a fully executed ballot.

Ballot #428 - Mr. Miller explained that this ballot was found by the Board of Inspectors intermingled in a previously opened container for ballots used in state judicial positions. This ballot had the identifying number clipped but was not strung. No explanation was given to the Court as to why this ballot was placed with unused judicial ballots, but it was needed to account for all ballots issued to voters. The Judge stated there is no evidence of fraud or wrong doing, but that the most logical explanation is that this ballot was mis-handled by either the election board or the recount board in its storage. The Judge ordered the ballot to be opened (it had remained sealed, without disclosure) and counted. Rep. Solbach asked if someone could have pulled the three ballots in question off the string and substituted three others in their place. Mr. Miller replied that anything is possible, but they would have had to have possession of that number of ballots.

Ballot #651 (Maizie Trail Ballot) - Mr. Miller explained that Maizie Trail is a 91 year old qualified voter, who is on the permanently disabled absentee voter list in Lyon County. She automatically receives absentee ballots each Election, and each

Election she marks her ballot and it is delivered to the County Courthouse by her daughter, Mazie Beals. Maizie Trail marked and signed her ballot on the Sunday before Election Day, and her daughter deposited it in a dropbox, marked "Courthouse Business only. Not for U.S. Mail", on Election Day at approximately 8:40. A Lyon County Commission secretary is responsible for picking up the Courthouse mail each day, which she does only once each day between 8:00 and 8:30. Consequently, Maizie Trail's ballot was not picked up until approximately 8:30 Wednesday, November 7, at which time the Absentee ballot was delivered to the County Clerk's Office. Mr. Miller cited statutes regarding mandatory and directory provisions, particularly K.S.A. 2511-32, and explained the controversy of whether the ballot should be counted, since it was not in the possession of the proper Election officials to be counted on November 6. Mr. Miller stated the Contestant's position is that the ballot should be counted, since it was on County property Election Day and since every effort was made by Maizie Trail's daughter to deliver the ballot before 7:00 p.m. Election Day.

Rep. Sawyer commented that since this was the routine manner in which the voter has cast her ballot for many years, her intent to vote is obvious; and her daughter had met her obligation to deliver the Absentee ballot to the Courthouse.

Rep. O'Neal stated that he interpreted the statutes to read that the ballot "must reach" the Election official before 7:00 p.m., Election day. He recalled to Mr. Miller the situation previously discussed when a ballot has not been clipped, indicating an invalid ballot. He emphasized that the responsibility is with the voter to make sure Absentee ballots arrive on time and that the ballot is properly clipped by the Election official and deposited in the proper box. He stated in the case of the Maizie Trail ballot, the risk may be in not personally delivering the ballot to the proper office. Rep. Solbach commented that since she is 91 years old and has voted the same way for many years, he thinks her vote should be counted. Mr. Miller added that the envelope has never been opened, so no one knows how she voted. In answer to a previous question, Mr. Miller said the Judge ruled that the ballot should not be opened or counted.

Mr. Miller requested time for Rebuttal after Mr. Hein's presentation.

Chairman Roy introduced Elaine Wells and Ron Hein, Attorney for Elaine Wells, Contestee. Ms. Wells stated she would make some remarks after Mr. Hein's presentation.

Mr. Hein stated that they are contesting three ballots as shown on the Contestee's Ballot list (Attachment 5) and have five rebuttal ballots. He continued by citing Chapter 25, Article 14, regarding election laws and stated that the law is clear; that the burden of proof is on the Contestant. He went on to cite K.S.A. 25-702 (passed in 1868), which states that the Court should go to extreme lengths to preserve the validity of all elections and should be slow and reluctant to override decisions of Elections officials. He went on to cite several cases and emphasized that the law reads that the burden is upon the appellant to furnish a record or to affirmatively show prejudicial error in trial court. Other statutes show the determination for a bi-partisan approach to election boards. Mr. Hein, regarding Mr. Miller's utilization of K.S.A. 25-3002 (b) (2 & 3), stated that those statutes must be used in conjunction with K.S.A. 25-3002 (b) (1) and K.S.A. 25-702. He went on to caution the Committee that both the Election Board and the Recount Board had made an unanimous determination to the number of votes for the Contestant and the Contestee. He stated that an optical scanner is used in Lyon County, and if ballots stick together, they won't be counted and in another case, the ballot was ripped by the machine. In Lyon County, 18 ballots were added and 6 taken away, most of those being errors attributable to the

optical scanner. He asked the Committee to note that the Board of Inspectors found only two ballots questionable in Lyon County. Chairman Roy asked when the ballots were recounted, if it was done by hand, and Mr. Hein answered that the Recount and the Inspectors Board were both hand counted and were within two votes of each other. He ended his presentation by saying that the Contestant has argued according to how the vote would turn out, and he does not think that is appropriate.

Ballot #100 - Mr. Hein said the Court ruled that this ballot did not contain an identifying mark, and it was counted as a valid ballot. The Court then reconsidered its decision and ruled this ballot should not be counted. Mr. Hein cited K.S.A. 25-1451 and commented that the Legislature does not have authority for discretion regarding identifying marks, but the statute says the Judge will make the final decision. Rep. Solbach said he was confused about Mr. Hein's statements made earlier regarding Appellant Review and now Mr. Hein states we do not have that authority. This issue was discussed during trial, and Mr. Hein again stated his concern about not having a Transcript available, and that the Committee members should have had a Transcript to study before these proceedings commenced. Rep. Solbach stated that this Committee's responsibility is to look at the application of the law to fact to determine whether the law has been upheld; that the Court took evidence and concluded the Findings of Fact. Mr. Hein stated that there is disagreement between he and Mr. Miller as to some of those Findings and without a Transcript, we are not sure nor can we remember exactly some of those Findings. Chairman Roy stated he is sorry a Transcript is not available - that he has been trying to get one, but they are not available.

Continuing with the discussion on Ballot #100, Mr. Hein stated that the voter testified in Court that this was his ballot. He erroneously marked the ballot for two other races (not for the 59th District) and to correct those errors, he wrote the word "error", initialed them to show it was he who had made the writings and then made his correct choices in each of the two races. Determination must be made as to if those are identifying marks. The statute governing identification marks was designed to prohibit fraud, so Mr. Hein stated that the purpose of this statute ceased to function. What must be determined is the intent and purpose of the voter regarding identifying marks. The Court found no evidence of fraud in this case, and considering all those matters, Ballot #100 was not made with the intention to identify and should not be invalidated.

Rep. Solbach, reminding Mr. Hein that he had stated the Committee should abide by the Judge's decision, asked then, why are you telling us now, regarding Ballot #100, to reverse the decision of the Judge? Mr. Hein stated he does not think this Committee has the authority to reverse a Judge's decision and he doesn't know what he can do about it, maybe take you (Legislature) to Federal Court.

Ballot #123 - Voter changed her name and ballot was challenged. Although the Judge ruled this ballot shall not be opened or counted, both counsels argued that this ballot should be counted. The Osage County Clerk testified she knew the voter and that she was registered under another name. Mr. Hein stated that under the law when a voter changes names, he/she must re-register. Since one gender is more likely effected by this statute, Mr. Hein argued that it is a technical error and that it is also unconstitutional.

Chairman Roy asked Mr. Miller if, during the trial, he stipulated this ballot. He explained the circumstances and why he did conditionally stipulate and stated that he believes this ballot constitutes a technical irregularity and is not constitutional. Rep. Shallenburger asked if this was a regular ballot and when it was

challenged. Mr. Hein replied that it is a regular ballot and was properly challenged at the time the voter was checking in prior to casting her ballot.

Ballot #528 - Mr. Hein calls this the "infamous fax ballot" and reminded the Committee it heard testimony earlier in the day from Mary Jo Hodge, Wife of William E. Hodge, who is serving with the Air National Guard in Saudi Arabia (see Pages 5 and 6 of this document). Mr. Hein explained he had searched for this voter with much difficulty and only last night was able to track this ballot to Mr. Hodge and the subsequent discussion with Mrs. Hodge.

Mr. Hein explained that the Federal Government granted authority to participants of Operation Desert Shield to use fax ballots to vote in this Election. Forty-nine of the 50 states were participants, with Kansas being one of the forty-nine after the Secretary of State signed an Affidavit. The Department of Defense filed a law suit against that state - Tennessee - and won a Mandate, thus requiring the State to count faxed ballots. Mr. Hein stated that an official from the Defense Department stated it will go to Court to uphold all Operation Desert Shield faxed ballots.

Mr. Hein referred to Pages 30 and 31 of Judge Wheeler's Memorandum Decision and Judgment where the Court ordered the ballot not be counted because of lack of evidence at the time of the Trial. Mr. Hein stated Mrs. Hodge has now testified the ballot in question is her husband's and that he believes if the evidence now known had been presented at the Trial, the Judge would have ruled the ballot should be counted.

Rep. Solbach complimented Mr. Hein on his compelling argument and was very critical of the Judge, who he said had obviously made an error in ruling on this ballot. He went on to voice his concerns that the Judge had made other errors. Mr. Hein reminded the Committee of the time restraints and that the Court could not delay further to wait for evidence on this ballot. He told of repeated attempts to find out more information on the faxed ballot, and said because we are at war, certain military records cannot be made public. He stated that new evidence can be introduced on Appeal but evidence cannot be changed. Rep. Solbach reiterated that the Judge should have presumed this ballot was valid.

Rep. O'Neal commented that the Judge, nevertheless, has invited the Legislature to look at this case and make a Determination. He stated that lack of rules and a rulebook has resulted in frustration on the part of both counsels, to preserve the rights of their clients, and on the Committee. Time pressures have played a part in the Trial and on the Committee with the result being some inconsistencies.

Rep. Sawyer stated that he didn't understand why the faxed ballot was thrown out and not counted. Mr. Hein replied the faxed ballot was apparently counted and not challenged by either the Election Board or the Recount Board but was challenged by all three Inspectors. Mr. Hein pointed out the number of disputed ballots - 651 - and difficulty working through that many ballots. He said the Judge's Findings are very detailed, and he believes that the Judge attempted to make Findings that could not be set aside. There is no allegation of fraud. He said faxed ballots have not been used previously, and appeared irregular to the Inspectors.

Mr. Hein, before beginning Contestee's Rebuttal Ballots, made initial remarks and stated that it may be impossible to determine intent on some ballots; however, if there is any possibility you can determine intent, then the ballot must be counted, which should be the standard. He continued by saying that his standard position regarding all the Rebuttal ballots is that the House does not have the authority to make these decisions, and you have no Transcript to verify testimony or evidence in this case.

Contestee's Rebuttal Ballots (continuing on Attachment 5) are as follows:

Ballot #59 - Voter has used different marks in selecting candidates. Contestee alleges intent is clear. Mr. Hein stated that if Ballot #59 is excluded, the following ballots should also be excluded: Nos. 272, 403, 424, 495, 598, 616 and 623. The Committee viewed all of the ballots.

Ballot No. 122 - First-time Voter went to Election Office where she registered to vote and cast "Challenged" ballot. Election officials did not have map and could not tell her where to vote and did not tell her where to vote. Mr. Hein stated that this Challenged ballot was the result of actions of Election officials, who could not give the voter information as to where she should go to vote. He referred to Page 6 of the Memorandum Decision and Judgment for details surrounding the Challenged ballot. He pointed out to the Committee that the County Clerk testified in Court that this voter was properly registered and had she voted at the proper voting place, her vote would be valid. He stated it is obvious the voter was misled, and there is no fraud alleged. The Judge determined that the vote should be counted, and he ordered the Court to open the ballot.

Ballot #532 - Ballot contains technical noncompliance (irregularities) as do Ballots No. 122, 529, 530, 531 and 533. Ballot #532 was executed by the husband of a woman who has Parkinson's disease and was unable to sign her name on the identifying declaration. Her husband completed the declaration and signed his wife's name and identified it as being signed by him. However, he did not complete the appropriate assistance affidavits required by law. Rep. Snowbarger asked for clarification on the required affidavits and stated that it appeared this was executed in good faith, even though the assistance affidavit was not completed. He and Mr. Hein agreed that this ballot should be counted, which was also the Finding from Judge Wheeler. Rep. Sawyer asked for clarification as to the differences between the Absentee ballots being discussed, and Mr. Hein recalled circumstances of the ballots in question. He stated that we must look at the intent of the statute and the intent of the affidavit. He said the County Clerk's office types the affidavits and sends them to the voter. Chairman Roy asked who is responsible for signing the affidavits, and Mr. Hein responded that the voter is responsible. Rep. Sawyer asked for clarification as to the difference in the Absentee ballots in meeting statutory requirements for completing affidavits. Mr. Hein stated that if Ballot Nos. 122, 529, 530, 531, 533 are excluded, then Ballot #532 should be excluded also.

Ballot #153 - Has No. "32" in the right hand corner, was fully executed, not clipped, and was not strung. Mr. Hein cited several statutes in his arguments, in particular K.S.A. 25-3002 (b) (2) and (3). This statute states that a ballot shall not be counted if it bears an identifying mark. Discussion was on what constitutes an identifying mark and the fact that Challenged ballots do not have numbers.

Ballot #314 - Boxes for both candidates for 59th district are marked. Mr. Hein argued that it was not possible to determine intent; that if we could restrict use of the paper ballot, that would not be fair for rural areas who still use paper ballots. Rep. Solbach questioned if this voter could have made an error, then tried to correct it, and Mr. Hein reminded the Committee there can be no extraneous marks. He cautioned the Committee to be consistent on interpretation. Rep. Snowbarger stated that it is not for us to determine, but the Board of Canvassers responsibility to do that. Mr. Hein stated that if Ballot #156 is excluded, Ballot #314 should be excluded as well.

Ballot #166 - Heavy diagonal slashes through boxes and slashes

extend over boundaries of boxes. Mr. Hein stated it is difficult to determine the intent of the voter. He said that is Ballot #166 is excluded, Ballots No. 50, 79, 87, 173 and 381 should be excluded as well. Committee viewed ballots.

Ballot #426 - Recount Board found this ballot in a manila envelope marked "two national and state ballots not voted" within a gray envelope used for "void, objected to and challenged ballots". (It was found with Ballot #427, but this ballot did not reflect a vote for the 59th District and is not relevant.) Mr. Hein stated that the identifying number placed on each ballot had been clipped from the corner, but had not been strung. He stated that one of the Inspectors testified as to where ballots were found and that they were clipped, but not strung. Rep. Sawyer asked if there was an error in keeping track of the ballots. Mr. Hein answered that there was no fraud alleged. He referred to Page 27 of Judge Wheeler's Memorandum Decision and Judgement as to the number of ballots, then pointed out that the Inspection Board found three ballots missing (Nos. 426, 427, 428). Rep. Solbach asked Mr. Hein if it was possible that the ballots were placed in the wrong envelope and were actually Challenged ballots. Mr. Hein stated they do not know why they were in there, and it is possible the ballots were mishandled by Election officials. Rep. Solbach pointed out that maybe the Election officials did not know how to handle Challenged ballots and and if this is the case, do the polling books show any other Challenged ballots being cast? Mr. Hein said he did not check the polling books - that is not my responsibility. He said the Election officials were instructed how to handle Challenged, void or objected to ballots, but he does not know if instructions were followed. Rep. Solbach presented several scenarios which could have taken place, and Mr. Hein stated that the Court did not presume fraud in computing the results of this Election, that no evidence of illegal votes or fraud has been established and no rebuttal offered by the Contestant. He said we could presume many things which would be a waste of time at this point. He went on to point out the Court ordered this ballot be counted.

Ballot #428 - Identifying number in corner had been clipped but had not been strung. Found by Osage County Inspection Board in previously opened container for ballots used in state judicial positions when it determined more votes were cast than there were ballots. Mr. Hein recited several statutes, in particular 15 K.S.A. 368, Page 375 and 237 K.S.A. 614, Page 617 and emphasized extreme lengths taken to uphold the validity of elections and provisions relating to misleading voters.

Ballot #62 - Was clipped and not strung and was treated as a "spoiled ballot". The Election officials treated it as an "objected to" ballot. Mr. Hein stated he considers it "defaced" and the result of a tasteless joke, the equivalent of graffiti on the wall. He stated he believes all three ballots (426, 427, 428) should be treated the same.

Rep. Sawyer asked the status of Ballot #428, and Mr. Hein explained this ballot was found when Election officials discovered they were one ballot short and conducted a search. As stated above, this ballot was found in a container for ballots used for state judicial positions. Rep. Shallenburger asked Mr. Hein about where Ballot #428 was found again and where Election officials are supposed to put ballots once they are challenged, objected to or spoiled. Mr. Hein went on to explain that once ballots are viewed, the voted ballots go in with the nonvoted ballots - the voted ballots are strung. Judge Wheeler ruled Ballot #428 be counted.

Mr. Hein stated that if Ballot Nos. 426 and 428 are excluded, Ballot #62 should be excluded as well. The Committee viewed all ballots discussed above.

Extensive discussion followed regarding which attorney had stipulated what ballots, and both Mr. Hein and Mr. Miller expressed frustration because the Transcript is not available.

Ballot Nos. 492, 493 - When identifying number was clipped in the corner, a clip occurred in the box of another race. Clip was taped back on both ballots, matching perfectly. Mr. Hein stated the Judge noted on one of the ballots a discoloration, but no evidence introduced or no explanation given. The Court ruled that, since the pieces fit perfectly, the ballots be counted. He explained, in detail, other ballots which were defaced and the statutes relating to them. He also stated that since many ballots in Lyon County were torn by the optical scanner, all of those could be ruled as invalid ballots. He went on to point out the manner in which the statutes read and the difference between ballots being torn by the voter as opposed to a ballot being torn by an Election official or equipment, such as the optical scanner. He listed ballots torn, or defaced, by the optical scanner as Ballot Nos. 501, 534, 583, 619, 625, 640. An objection was made by Rep. Solbach that Mr. Hein was admitting additional ballots, which was a violation of the Rules adopted by the Committee. Mr. Hein responded that the Committee had allowed Mr. Miller to introduce ballots not previously discussed.

Rep. Solbach then asked the definitions of mutilation and clipped, and a discussion ensued regarding the application of those definitions to the ballots being discussed. Mr. Hein then referred to the testimony given by Rep. Mead and the circumstances surrounding that election and subsequent Special Election. It was agreed that the Mead vs. Freedom ballot involved only that race and none others were contested.

Rep. O'Neal referred to K.S.A. 25-3002 (b) (1) and said that it read that other races on a ballot would be valid votes and the only one in question would then be the race effected by the clip, or that was torn, or that was the result of a technical error. Rep. Shallenburger asked Mr. Hein for clarification on his arguments and reasons for the rebuttal ballots. Mr. Hein recounted proceedings during the Trial and went on to state that he has held that the laws should be strictly construed and enforced relating to the ballots and that he believes all ballots discussed above should be counted.

Ballot #552 - Torn ballot with tape over tear. Mr. Hein stated that the Lyon County Clerk testified that one ballot was torn by the optical scanner and that she taped over the tear; however, she could not identify if this was the ballot. He stated that if Ballot #552 is excluded, Ballots No. 568, 570, 613, 632, 635, 639, and 644 should be excluded also.

Ballot #651 - Known as the Maizie Trail Ballot. Absentee ballot delivered by a third party at a drop box at the Lyon County Courthouse and was not received until after the 7 p.m. Election Day deadline. Mr. Hein cited K.S.A. 25-1132 and emphasized "constructive receipt" and setting the standard for meeting deadlines. It is not enough that an effort was made to meet the deadline, he said, it is a mandatory statute and was designed to eliminate fraud. Otherwise, people would come in and want to vote the day after election.

Rep. Sawyer stated he understands the statute is designed to eliminate fraud, but he contends that the person delivering the Absentee ballot had every right to expect that the ballot would be picked up that day and delivered to the proper office. Mr. Hein stated he agrees with that, but recalled "constructive receipt" as discussed earlier.

Rep. Solbach stated he understood the intent of the statute, but that no evidence of fraud has been found. He went on to say he

does not understand Mr. Hein's argument on "constructive receipt" and gave examples to illustrate his point.

The Judge ruled that the Maizie Trail Ballot should not be opened or counted.

Mr. Hein, in closing remarks, emphasized the statutes referred to were enacted to eliminate fraud, to ensure that illegal votes should not be counted and that valid ballots are not rejected, and that denying the right to vote is an illegal act - all of these relate to the case at hand. He stated the final point he wanted to make is that, to reiterate again, that he believes the burden rests on the Contestant for two reasons. One, because she brought the action, she was ruled against by the court, then she appealed, then the burden is on the Contestant to prove the election should be invalidated. He quoted statutes referred to before, which state we should go to extreme lengths to preserve an Election. K.S.A. 25-702 says that you should not do anything to defeat the free will of the people. The free will of the people have been expressed. It was a close Election, and I believe that the Recount was valid, a proper count, and we should abide by the standards set. The Court made the only Ruling it was asked to make by the Legislature. It made that Finding, and that Finding should not be overturned by this Committee, nor by the House of Representatives. The burden is on the Contestant, and the Ruling that was made should be upheld. I would urge this Committee to abide by that Rule and abide by those standards and not subject the electoral process to one whereby, just because someone chooses to dispute an elective contest, can do whatever they want to disregard this process. Not having witnesses here to testify, not having a copy of the Transcript, I would hope the Legislature will recognize the importance to the public that the conduct of this Committee and the Legislature be consistent with the well established rules. I do want to thank the Committee for its attention and time during this long ordeal to present our case to you.

Mr. Hein introduced Rep. Elaine Wells, who made brief remarks (Attachment 6) to the Committee. She specifically asked the Committee to count the Operation Desert Shield ballot and stated that it would be a travesty not to count that ballot.

Chairman Roy adjourned the Committee until 1:00 p.m. tomorrow.

Attach. 1

RULES OF SELECT COMMITTEE ON ELECTION CONTESTS

Rule 1. The select committee shall consider the files, records and evidence transmitted from the court and shall hear the contestant and contestee and their respective counsel. All members shall have access to such files, records and evidence at such reasonable times as determined by such committee. Such select committee shall have powers of compulsory process and laws applicable thereto shall apply, except that all hearings shall be open. The select committee shall consider each ballot in dispute by either contestant or contestee and shall make an individual determination and recommendations thereon.

Rule 2. Access to files, records and evidence by appointment. All members of the house of representatives shall have access to the files, records and evidence transmitted from the district court. Such files, records and evidence shall remain in the custody of the speaker but members may obtain access by requesting an appointment between 8:00 a.m. and 5:00 p.m. and fixing a time for the review of the same by such member. Such files, records and evidence may be reviewed subject to such reasonable limitations as may be necessary to protect the official records of the court.

Rule 3. The select committee shall report to the full house of representatives not later than ten days after its appointment. The report of such committee shall be so designed that a separate report and recommendation shall be made upon each ballot at issue by either the contestant or contestee. Any ballot upon which no recommendation is adopted by a majority of the members of the committee shall be identified and reported separately together with the recorded vote of each member of the committee and the order of the court regarding the same.

Rule 4. No member of the committee shall communicate with the contestant or contestee or the attorney for either party upon any matter under consideration by the committee except during the public hearing conducted by the committee

HSCES
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attachment 1

Rule 5. Sealed ballots transmitted by the district court and remaining unopened by the court shall remain unopened by any member of the committee or by any member of the house examining the records, files and evidence prior to determination of such matter by the house.

Mr. Chairman and Members of the Committee, my name is Karlen Christesen-Jones. Until my marriage last December and during the campaign of last year, my name was Karlen Christesen-Wellman.

Appearing here is not what I had in mind when I first made plans to come to the Legislature. While I realize it is statutorily required that I have this forum, I do want to express my sincere appreciation for the opportunity to appear before your committee.

I respectfully request your continued patience as you wade through what you will no doubt soon find to be a set of complex, cumbersome and somewhat perplexing election laws.

You should know that I thought seriously about not appearing before your committee. This ordeal has taken its toll on my family as well as myself. While my desire to represent the people of the 59th District continues, I certainly have wondered if completion of this process warrants the personal price being paid by those I care about.

I am also mindful of the delicate circumstances in which your consideration of this issue places you. I understand the potential for friction among members of the House. I am heartened by the remarks of both the Minority and Majority leaders of the House which I read in this morning's paper. They are absolutely correct in their statements that this is not a

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Attachment 2

matter of partisan politics. Likewise, this is not an issue of my opponent nor of me. What you have before you is simply an issue of election law -- what are the election laws of Kansas and what is the obligation of citizens and election officials to apply those laws.

My decision to appear before you ultimately hinged on several things. First, and most importantly, I believe I am right. I sat through the week long trial, I have personally examined the ballots at issue, and I have read the election laws which I believe apply to this case. My conclusion is that when the law is properly applied to the ballots in question, I won this election. To simply say I do not want to bother with it any longer would be a betrayal to my party, to those who voted for me, and to the countless individuals who helped on my campaign and since the election.

Secondly, without your close scrutiny, I fear a repeat of many of the problems encountered throughout this process. I can say that six months ago I could not have envisioned there would even be a need to argue the inclusion of unsigned absentees, votes cast at the wrong location, and unaccounted ballots discovered mysteriously and apart from the valid ballots. If laws are outdated, poorly drafted, poorly implemented or not applied because of harsh results, then you should know it. If you personally experience the discomfort these laws cause, then perhaps you, as lawmakers, will see that people who may encounter similar circumstances do not suffer because of them.

Please keep in mind that I did not create the system that finds me before you today, and I did not have a hand in writing the laws I will be asking you to apply. I do not feel good that I must argue the application of laws in which I personally disagree. I do believe in the legislative process, however. My understanding of that process is that laws are changed by the legislature, not the courts, and that changes are to be made prospectively not retrospectively.

Do not be directed by the personal impact your decisions will have on me. Whether I am declared the winner or loser of this election, my life will not be significantly affected. My family will remain my focal point whether I ever serve a day in the Kansas House. My dedication to my community can be demonstrated in a thousand different forms of service other than serving in the legislature. My political plans in two years will likely not be directed by the course of events in the next few days.

In the last few months I have been both a winner and a loser in the political world. By experiencing both winning and losing an election in such a short time frame, one tends to put into perspective the things in life that matter the most.

I would like at this time to ask my attorney to explain which ballots we take issue with the Court and the reasons for our disagreement.

Once again, thank you.

Attach 3

HEIN AND EBERT, CHTD.

ATTORNEYS AT LAW

5845 S.W. 29th, Topeka, Kansas 66614

Telefax 913/273-9243

913/273-1441

Ronald R. Hein
William F. Ebert
Steven D. Rosel

January 18, 1991

Rep. Bill Roy, Jr.
c/o Speaker Markin Barkis
Room 380-W, State Capitol
Topeka, KS 66612

VIA TELEFAX
296-0251

RE: Wellman v. Wells
Case No. 90-CV-87
Our File No. 3288.001

Dear Bill:

Please find enclosed a list of the ballots and issues which I desire to be addressed pursuant to the Select Committee's request.

Sincerely,

HEIN AND EBERT, CHTD.



Ronald R. Hein

RRH/lj
Enclosure
cc: Mr. Vic Miller (via telefax)

Post-It [®] brand fax transmittal memo 7671		# of pages ▶ 2
To Rep. Bill Roy	From Ron Hein	
Co.	Co.	
Dept.	Phone #	
Fax # 296-0251	Fax # 273-9243	

HSCEC
1-22-91

Attachment

CONTESTEE'S BALLOTS--COURT RULING IMPROPER

Ballot #100 Not an identifying mark (K.S.A. 25-3002(b)(2))

Ballot #123 voter changed name; challenged ballot; both parties argued that ballot should be counted; name change law unconstitutional

Ballot #528 Original of telefaxed ballot; permitted by law; improperly excluded; no evidence offered by contestant

Contestee's Rebuttal Ballots
(in response to contestant's ballots)

Ballot #272, Ballot #403, Ballot #424, Ballot #495, Ballot #598, Ballot #616 and Ballot #623
(Same issue as Ballot #59); contestee alleges intent clear; but if Ballot #59 is excluded, Ballot #272, Ballot #403, Ballot #424, Ballot #495, Ballot #598, Ballot #616 and Ballot #623 should be excluded as well

Ballot #314 (Same issue as Ballot #156); contestee alleges intent clear; but if Ballot #156 is excluded, Ballot #314 should be excluded as well

Ballot #50, Ballot #79, Ballot #87, Ballot #173 and Ballot #381
(Same issue as Ballot #166); contestee alleges intent clear; but if Ballot #166 is excluded, Ballot #50, Ballot #79, Ballot #87, Ballot #173 and Ballot #381 should be excluded as well

Ballot #62 (Same issue as Ballot #426 and Ballot #428); Ballot #62 was not strung; evidence was offered on all three ballots, contrary to contestant's allegation on ballot list; if Ballot #426 and Ballot #428 are excluded, Ballot #62 should be excluded as well

Ballot #146, Ballot #302 and Ballot #454
(Same issue as contestant's Ballot #492 and Ballot #493); if Ballot #492 and Ballot #493 are excluded, Ballot #146, Ballot #302 and Ballot #454 should be excluded as well

Ballot #568, Ballot #570, Ballot #613, Ballot #632, Ballot #635, Ballot #639, Ballot #644
(Same issue as contestant's Ballot #552); if Ballot #552 is excluded, Ballot #568, Ballot #570, Ballot #613, Ballot #632, Ballot #635, Ballot #639, Ballot #644 should be excluded as well

Ballot #532 (Same general issue as Contestant's Ballot #122, Ballot #529, Ballot #630, Ballot #531 and Ballot #533--technical irregularity); if Ballot #122, Ballot #529, Ballot #630, Ballot #531 and Ballot #533 are excluded; then Ballot #532 should be excluded as well

Fifth Judicial District Court
State of Kansas

MERLIN G. WHEELER
DISTRICT JUDGE

LYON COUNTY COURTHOUSE
EMPORIA, KANSAS 66801-4095
(316) 342-4950, EXT. 293

January 14, 1991

Mr. Ronald R. Hein
Hein & Ebert, Chtd.
5845 S.W. 29th Street
Topeka, KS 66614

Mr. Vic Miller
Attorney at Law
700 Jackson, Suite 404
Topeka, KS 66603

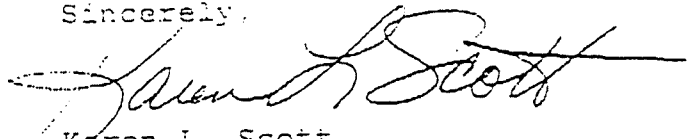
Re: Wellman v. Wells
Case No. 90-CV-87
Osage County District Court

Gentlemen:

Pursuant to Judge Wheeler's instructions, I am telefaxing a copy of his memorandum decision to you this date. I am omitting from the fax transmission the ballot tally sheets and the appendix to the decision. You will receive a complete set of copies, including those by U.S. Mail.

Jeanne Turner, Chief Clerk, will be transporting the original of the decision to Osage County today. The Judge has asked that his decision not be made public until 3:00 this afternoon to allow time for this filing to be completed.

Sincerely,



Karen L. Scott
Secretary to Judge Wheeler

HSCEC
1-22-91
Attachment 4

IN THE DISTRICT COURT OF OSAGE COUNTY, KANSAS

IN THE MATTER OF THE ELECTION OF

ELAINE L. WELLS, TO THE POSITION OF
59TH DISTRICT, STATE REPRESENTATIVE

KARLEN CHRISTESEN-WELLMAN,
Contestant,

Case No. 90-CV-87

vs.

ELAINE L. WELLS,
Contestee.

MEMORANDUM DECISION AND JUDGMENT

(Filed Pursuant to K.S.A., Chapter 25)

This is an election contest filed pursuant to the provisions of K.S.A. 25-1434, et. seq. A discovery conference was held December 11, 1990, with motions heard on December 12, 1990, and trial commencing on December 14, 1990 and continuing on December 18 through 21, inclusive, 1990.

The following findings of fact and conclusions are made by the Court:

1. The Contestant, Karlen Christesen-Wellman, now known as Karlen Christesen-Jones, and Elaine L. Wells, Contestee, were opposing candidates for the position of State Representative of the 59th Legislative District in the November 6, 1990 general election. This legislative district encompasses Osage County, Kansas and a portion of Lyon County, Kansas. In the original tabulation of the results of the election and in the initial canvass by the respective County Boards of Canvassers it was declared that the Contestant received 3,474 votes and the

Contestee 3,463 votes, a margin of 11 votes. Upon a recount requested by the Contestee and conducted on November 15, 1990, and a canvass by the respective Boards of Canvassers on November 16, 1990, the Contestee was declared as having received 3,476 votes and Contestant having received 3,474 votes, a margin of two votes. The Contestee, Elaine L. Wells was therefore declared the winner of the election by the State Board of Canvassers on November 28, 1990 and was issued the Certificate of Election.

2. The Contestant filed, on November 28, 1990, her notice of contest alleging three grounds pursuant to the provisions of K.S.A. 25-1436. These are: 1) that some voters were deprived of the right of voting for Contestant when such voters had the right under the election laws of Kansas to vote thereon, and such deprivation could change the result of the election [K.S.A. 25-1436(b)]; 2) illegal votes were received or legal votes were rejected which could change the result of the election [K.S.A. 25-1436(c)]; and 3) error occurred in computing the results of the election which could change the result of the election [K.S.A. 25-1436(b)]. No allegation was made of any fraud or wrong-doing occurring in connection with this election. The Contestee answered, denying any right of relief to Contestant and further arguing that the Contestant was ineligible to hold this office. At the close of the discovery conference and hearings on the Contestee's Motion to Dismiss and the Contestant's Motion for Inspection, this Court ruled that

there was no factual basis to support the grounds enumerated at K.S.A. 25-1436(b) and (d) and that the matter would proceed upon a determination solely of whether illegal votes were received or legal votes were rejected which could change the result of the election. The Court further noted at the conclusion of the presentation of evidence in this matter that there was no evidence to support and the Contestee did thereupon withdraw any claim of ineligibility on the part of the Contestant.

3. On December 14, 1990 the Court denied the motion of the Contestee to dismiss and granted the motions of both parties for an inspection of ballots pursuant to the provisions of K.S.A. 25-1447. The Court did thereafter appoint two Boards of Inspection for Osage and Lyon County who subsequently met and recounted all ballots in all precincts in both counties. These inspectors separated for the Court's inspection 650 ballots which were questionable in some respect and which could not be agreed upon by the unanimous vote of the inspectors as being properly cast ballots. In addition to the 650 ballots identified by the inspectors, one additional ballot (hereinafter referred to as the Mazie Trail ballot) was identified as having been attempted to have been cast and not counted in Lyon County. Subject to the Court's inspection and decisions concerning the 650 ballots plus the Mazie Trail ballot, the inspectors count was 3,182 votes for the Contestant-Wellman and 3,150 votes for the Contestee-Wells. At the request of the Court the respective inspection boards identified each of the 650 questionable

ballots (or envelopes containing a ballot) by fixing to each, in numerical sequence, numbers 1 through 650. For the purposes of this Memorandum Decision a reference to a particular ballot number means a reference to the ballot number as assigned by the inspection boards. Each board of inspectors also maintained a log specifically identifying for the Court the reason why each of the ballots was questioned and which of the inspectors questioned said ballot. The logs of the two boards were separated by county and appended to them each board also prepared a tally sheet reflecting the cumulative totals for each county and signed the same. The court accepted the inspectors' report and as to the undisputed ballots counted by the inspectors finds the inspectors' count to be more accurate than the count of the special election board or of the recount board. The Court does herein note that both inspection boards meticulously and over long periods of time examined all individual ballots found to exist in connection with this election and there is no question in the Court's mind that the totals provided by the inspection boards are accurate.

4. Of the ballots numbered 1 through 650 plus the Mazie Trail ballot which were identified by the inspectors as being questioned, counsel for the parties grouped the same according to various common characteristics shown on said ballots and stipulated as to the manner in which certain ballots should be counted by the Court, which said stipulations were accepted by the Court during the trial. Following receipt of the

stipulations, the parties and the Court identified approximately 62 ballots which required specific and detailed argument and review by the Court. During the course of the trial rulings were made on all but 12 of the 62 ballots which remained at issue. The rulings of the Court with regard to all ballots except the 12 is noted upon the attached tabulation which is made a part hereof by reference. The respective totals of the parties following this calculation were 3,481 votes for the Contestee-Wells and 3,477 votes for the Contestant-Wellman. (The Court will direct the attention of those reading this Memorandum to the later discussion with regard to ballot number 100 in which the Court reverses its earlier oral ruling regarding the manner in which said ballot should be counted and determines that said ballot should be rejected in its entirety. The totals were therefore adjusted to 3,480 votes for Wells and 3,477 votes for Wellman.)

5. With regard to the remaining portion of this Memorandum Decision, the following general comments are applicable:

A. The use of the term "Election" refers to the November 6, 1990 general election for the 59th District of the Kansas House of Representatives, unless otherwise specifically noted.

B. All references to cities, townships, or precincts are in Kansas within the 59th Representative District.

C. Any reference to a ballot number is to the number assigned to a questioned ballot by the Court's inspection boards unless otherwise specifically noted.

D. For convenience purposes the Contestant, Karlen Christesen-Wellman, now known as Karlen Christesen-Jones, shall hereafter be referred to as "Wellman". Hereafter the Contestee, Elaine L. Wells, shall be referred to as "Wells".

E. The election officers of both Lyon and Osage counties are the respective County Clerks.

6. The assessment of costs of this proceeding is governed by the provisions of K.S.A. 25-1452. The Court specifically finds that, notwithstanding the determination as to the total number of legal ballots cast and the outcome of this contest, the interests of justice dictate that due to the nature and extent of the issues involved, costs should be waived as to both parties and are hereby taxed to the state of Kansas to be paid by the Director of Accounts and Reports from any appropriations made therefore upon receipt of vouchers approved by the respective Clerks of the District Courts of either Lyon or Osage County.

7. **BALLOT NUMBER 122.** Stacy Jane Ripley is a 20 year old resident of Osage County with her permanent residence at Route 1, Box 215, Scranton. Miss Ripley had not voted prior to the election and had only registered during the summer of 1990 preceeding the election. Stacy Ripley registered to vote at the City Hall in Overbrook (Elk Precinct). Due to some confusion as

to the proper precinct designation for her residential address she was initially assigned by the County Clerk's office to Ridgeway Precinct for voting purposes but this error was detected by the office and the voter registration card mailed to the permanent residential address of this voter designated her polling place to be in Fairfax Precinct. There is no question that Stacy Ripley is a qualified elector in Osage County. Similarly there is no indication that this voter did not receive her voter registration card containing the proper precinct designation.

The Osage County Clerk's office publishes a list of polling places for each election and is available for telephone communications to assist in determining correct polling places. Despite this fact, Stacy Ripley, on election day, presented herself for voting at the place where she had originally registered believing, albeit erroneously, that this was her proper polling place. The supervising election judge, Ira Allen, informed her that she was not on the voter list for this precinct and suggested another precinct as her voting place even though he did not know if the suggested precinct was correct. Stacy Ripley had conversations with other election board members, following which she concluded, without being assured by any board member, that even though this was the incorrect polling place the problem would be corrected. The supervising election judge did inform her that her ballot would be

"challenged", but it was not until later in the evening after she had voted that she realized that her ballot might not be counted.

There was no testimony or evidence of the compliance of the election board in Elk precinct with K.S.A. 25-410 which requires the administration of an oath to the voter, but it is clear that a ballot would not have been given to the elector pursuant to the provisions of this statute if said oath was not given. In the absence of any evidence to the contrary as to non-compliance with K.S.A. 25-410, the Court cannot find facts existing which would find that there was any irregularity in the handling of the challenged ballot on the part of the election board.

Although the supervising election judge could not specifically confirm ballot number 122 as the Stacy Ripley ballot challenged by him, he was aware of only two challenged ballots occurring in his precinct, the other being cast by his son. The supervising election judge did confirm that the "challenged" envelope containing ballot number 122 (identified also as Osage County ballot number 462) appears to contain the ballot in question. There is little, if any, doubt in the Court's mind that ballot 122 is any ballot other than the ballot cast by Stacy Ripley. Additionally, there are no facts from which the Court could conclude or even infer that the county election officer erred in the handling of this challenged ballot, that the voter attempted to vote twice by voting at any

other precinct, or of any other irregularity concerning this ballot.

This voter was provided with a voter registration card designating the proper precinct in which this elector should vote. The voter erroneously, although given her lack of experience, quite understandably, went to her original place of registration to attempt to vote. The voter did, however, also erroneously assume that her ballot would be counted and went ahead and voted even knowing of the challenge which would be made by the election board although the effect of this challenge was unknown to this voter. The voter made no attempt to locate the proper polling place even though that information is readily available from the Clerk's Office. At the same time apparently none of the election board at the erroneous precinct attempted to obtain that information for her either.

K.S.A. 25-2908 provides that if the name of any person desiring to vote is not in the registration books, the person may be challenged as provided in K.S.A. 25-414. K.S.A. 25-409 provides the procedure for the acceptance or rejection of a challenged ballot. Subsection (a) of this statute provides that if a voter refuses the oath prescribed by K.S.A. 25-410 the judges shall reject such vote. Subsection (b) provides that if the oath is taken and the judges are satisfied that the person is a legal voter, the person shall be allowed to vote; but if

not so satisfied the ballot shall be challenged and placed in a sealed envelope with the county board of canvassers to determine the acceptance or rejection of the same.

The Court finds no statute or case which rules on the specific issue of the counting of a ballot under circumstances such as are found to exist here. However, the Kansas Supreme Court in Kimsey v. Board of Education, 211 Kan. 618, 628, 507 P.2d 180 (1973) points out that each voter should have but one place at which to vote depending on the area in which the voter lives. In Kimsey the Court did note that while the statute dealing with the designation of polling places was not complied with, this irregularity should be ignored except in circumstances showing a denial of a right to vote or an attempt to vote in more than one place.

Similarly, in the case of Lambeth v. Levens, 237 Kan. 614, 617, 702 P.2d 320 (1985), the Supreme Court indicates that substantial compliance with the laws regulating the conduct of elections is sufficient and that mere irregularities should not be permitted to frustrate the will of the voters in the absence of intentional or willful violation of the statute or evidence of fraud.

A similar rule is codified in K.S.A. 25-3002 which provides that no ballot shall be invalidated by reason of any technical error.

The procedural rules of K.S.A. 25-409 are founded on principals designed to protect the integrity of the voting

process from attempts to fraudulently alter the results of an election by multiple voting or voting in more than one place or similar acts designed to alter the outcome of an election. The procedure of K.S.A. 25-409 does not automatically require a ballot not be counted under circumstances such as presently before this Court and allows the board of canvassers to review the propriety of allowing the ballot. Where, as here, the voter does not appear to have voted more than once or intentionally attempted to violate election laws, the guidance of both the Kimsey and Lambeth cases dictate that this vote should be counted. The Court will therefore open this ballot and will note the results as later set out.

8. **BALLOT NUMBER 123.** Ballot number 123 is another ballot which was "challenged" by precinct a election board. It appears that the elector of this ballot was registered under the name Beverly K. Fentin. Her name was subsequently changed to Beverly K. Johnson, although the reason is not known to this Court nor relevant to the determination of this case. The voter apparently did not re-register under her new surname as required by K.S.A. 25-2316(c)(a).

There is no evidence indicating that the change of this person's name occurred within 30 days of the election which would have entitled this elector to vote upon the giving of an affidavit showing the relevant facts as to the name change. Without such a showing, the Court cannot presume that the voter is otherwise a qualified elector. Therefore, notwithstanding

the apparent disparate impact upon potential female electors (this gender being most subject to name changes) there is no showing this person was a qualified elector. This ballot shall therefore not be opened or counted.

9. ABSENTEE BALLOTS.

A. UNSIGNED IDENTIFYING AFFIDAVITS. The provisions of the law regarding absentee voters (K.S.A. 25-1114, et. seq.) establishes a specific procedural scheme to accomplish the purpose of this act. Central to this scheme are two affidavits which must be completed by the absentee voter or on behalf of the absentee voter. The first is the statement required by K.S.A. 25-1122b in order to obtain the absentee ballot. This statement is for the purpose of qualifying a prospective absentee voter and will be hereinafter referred to as the "qualifying affidavit.". The second statement is required to be completed by the absentee voter at the time of voting pursuant to the provisions of K.S.A. 25-1124 (utilizing the form set out in K.S.A. 25-1120) and is contained on the exterior ballot envelope used to transmit the absentee ballot to the county election officer. The second statement will be hereinafter referred to as the "identifying affidavit" or declaration since its purpose is to identify the ballot as to that cast by an authorized absentee voter. It is the failure to comply with K.S.A. 25-1124 which forms the basis for the challenge to four ballots, identified as the Bernard Lee (ballot number 529),

Charles A. Johnson (ballot number 530), Melissa Rewertz (ballot number 531), and Nathan Rewertz (ballot number 533) ballots.

Each of these four ballots has several common characteristics. Among these include the fact that all were challenged because the absentee voter failed to sign the identifying affidavit required by K.S.A. 25-1124 which is printed on the exterior envelope designed to transmit the ballot to the county election officer. All are qualified electors in Osage County.

In the case of Bernard Lee, the evidence was that the absentee voter voted in the office of the County Clerk of Osage county and was known to the County Clerk as a qualified elector. Included within the "challenged" envelope containing the Bernard Lee absentee ballot was the envelope used by the Clerk to transmit the absentee voter supplies to the voter (ballot number 529C), the absentee ballot envelope for Osage county ballot number 210 (which was found by the Court to be sealed and which has been identified by the board of inspectors as ballot number 529B), an absentee ballot transmittal envelope (found by the Court to be sealed and identified by the board of inspectors as ballot number 529A) and a copy of the absentee voter instructions (identified by the board of inspectors as ballot number 529D). The Court finds that the elector completed almost all of the identifying affidavit information required by K.S.A. 25-1124 except that the voter failed to note the ballot number assigned by the election officer and sign the

declaration. Examination of both the transmittal envelope (ballot number 529A) and the ballot envelope (ballot number 529B) shows ballots to be sealed within each of these two envelopes, again erroneously since all ballots should have been contained within the ballot envelope (ballot number 529B). However, without opening these two envelopes, the Court cannot determine the exact nature of the contents. It is, however, understandable that a voter could erroneously put ballots in both of these envelopes since in this particular election three separate ballots were delivered to the voter, one for national and state races, one for state judicial races, and one for a question submitted.

The voter, Bernard Lee, could identify his writing on exhibits 529C and 529A and believed that exhibit 529B also contained his ballot but could not so testify with absolute certainty. It was stipulated, however, that his ballot was cast on November 2, 1990 and was voted in the office of the Osage County Clerk and not transmitted by mail. It is also a fact that this person is a qualified elector in Osage county.

Wellman challenges this ballot because the absentee voter could not specifically identify it as his and due to his non-compliance with K.S.A. 25-1124. The Court finds that all absentee ballots have been otherwise accounted for and in the absence of fraud or other wrong-doing, together with the failure of Wellman to offer any credible evidence that exhibits 529B and C did not contain Mr. Lee's ballots, these exhibits are

ballots cast by Mr. Lee. The Court further finds no explanation for the failure to sign the identifying declaration since Mr. Lee was aware of this requirement, but believes that the reason is irrelevant to a decision regarding this ballot. The Court does note, upon opening all envelopes pertaining to Mr. Lee, that the three ballots found in the two envelopes all bear the same identifying number given by the county election officer and therefore specifically finds that all three ballots were those cast by Mr. Lee.

In the case of both Melissa Rewertz (ballot number 531) and Nathan Rewertz (ballot number 533), both absentee voters could identify their respective transmittal envelopes and openly acknowledged their failure to sign and complete the required identifying declaration. Each ballot was completed individually by the respective voter and was delivered by hand to the office of the Osage County Clerk, although not apparently delivered by these voters, but by one of their parents. Both voters have sufficiently identified the ballots noted above, which admittedly are valid but for the incomplete and unsigned identifying declaration.

With regard to the Charles A. Johnson ballot (exhibit number 530), the same was voted by the absentee voter and returned by mail and received by the Osage County Clerk on November 5, 1990. The manner of voting by this person was acceptable but for the lack of compliance, in any respect, with the obligation to complete the identifying declaration.

K.S.A. 25-3002(b)(1) provides that no ballot shall be invalidated by reason of any technical error. This statute appears to be a codification of the rules of law found in the decision of the Kansas Supreme Court in Hansen v. Lindley, 152 Kan. 63, 102 P.2d 1058 (1940), wherein the Court held that when irregularities and deficiencies in the affidavits required by the statutes were merely clerical errors or formal mistakes the ballots were valid and should be counted. A similar ruling was made in Lambeth v. Levins, at page 617 of the opinion.

The question is whether the lack of a signature on the identifying declaration is a mere irregularity, as contended by Wells, or a sufficient non-compliance with the statute as to cause these ballots to be disregarded as contended by Wellman. In resolving this issue it is helpful to identify the purpose of requiring the identifying declaration. In Burke v. State Board of Canvassers, 152 Kan. 826, 107 P.2d 773 (1940), the Kansas Supreme Court noted that this purpose was to identify the voter as being the same person who was certified by the County Clerk and is not for the purpose of showing the voter's qualifications otherwise. In this case it was also noted that the duty of the canvassers was limited to determining that the person whose vote is to be counted is the same person who was certified by the County Clerk as a qualified elector.

Further helpful to the resolution of this issue is the case of State v. Tipton, 166 Kan. 145, 199 P.2d 463 (1948) wherein the Court noted that the general rule of construction

was that unless mandatory provisions compelled a contrary result, election statutes, like other statutes, are to be liberally construed to accomplish their essential purposes (see page 150). The State v. Tipton and Hansen and Lambeth cases are also evidence of the Court's approval of such rule.

This Court finds no statute or binding case which defines the meaning of a mere irregularity or technical defect or the point at which such irregularity or defect becomes so substantial as to cause exclusion of a ballot. In the Hansen decision the Court dealt primarily with irregularities in the qualifying affidavit and the following irregularities were found not to invalidate a ballot:

1. The voter's signature was on the wrong line;
2. The notary's acknowledgement contained corrections;
3. Erroneous descriptions of the venue of the notarization were made.

All of these errors were either clerical errors or obvious mistakes and do little to aid in the resolution of the issue raised by these four ballots.

Wellman argues that the case of Erikson v. Blair, 670 P.2d 749 (Colorado, 1983) controls. This was an election contest case in which the validity of several absentee ballots were questioned. These irregularities included the failure to write the election date and address on the affidavit form and failure to sign the election form which is similar to the

identifying declaration used in Kansas. The Colorado Supreme Court ruled that where there is neither claim nor proof of fraud, undue influence, or intentional wrong-doing in the election, the appropriate standard in determining the validity of absent voter ballots is whether the absent voter affidavits substantially comply with the statutory requirements for absentee voting (see page 753). The Court further defined the term substantial compliance at page 755-756 of its decision to mean that the absent voter has affixed his or her signature to the affidavit and has provided sufficient information in the affidavit to establish the elector's qualifications to vote in a special district election. It is clear therefore in Colorado that the existence of the signature on the affidavit is the starting point for the inquiry under the substantial compliance standard; the failure to sign, in the opinion of the Court means that the affidavit is insufficient as a matter of law.

While there is little doubt that Kansas has also adopted a substantial, rather than strict compliance standard, three factors appear which mitigate against the carte blanche acceptance of the Erickson bright-line rule. First, formal voter registration was not a pre-requisite to voting in the special district election involved in the Erickson case in Colorado. Hence, the voter declaration in Erickson is the only means by which the qualification of the elector to vote is ascertained. This is in considerable contrast to the rules in Kansas and the facts in this case which were that these electors

were known by the County Clerk to be qualified electors and would not have received absentee ballots without this knowledge. Secondly, in Erickson, there was no showing that the election officer personally received any of these ballots as was the case in the Bernard Lee ballot and the delivery by the parent of the Melissa and Nathan Rewertz ballots. Finally, there was apparently no testimony offered in the Erickson case to cure the deficiencies in the unsigned voter declarations as was offered in this case.

The Kansas Supreme Court, in the Hansen decision, recognized at page 75 of the opinion that the testimony of the voter may be offered to cure deficiencies in the qualifying affidavit and that based upon the oral testimony of the voter, substantial compliance with the statute was found to exist. The Court also, at pages 75 and 76 of the opinion, allowed the testimony of electors to describe the ballots and to cure a complete lack of the identifying affidavit which was not transmitted along with the ballot.

While the deficiencies found in the present cases were caused by the voters and not by an election official, it is clear that Kansas will go to great lengths not to invalidate a ballot. This Court sees little distinction between allowing testimony to cure a completely absent identifying declaration but not allowing the testimony to cure one that was merely not signed. This conclusion, coupled with the other distinctions noted from the Erickson case, compels this Court to find that

the Erickson decision should be limited to its facts and that since the purpose of the declaration is to properly identify the ballot as that of a qualified elector, this purpose has been fulfilled and these ballots are therefore ordered to be opened and counted.

B. BALLOT NUMBER 532. Virginia Courson is a registered voter in Elk Township in Osage county. She suffers from Parkinson's disease and while physically paralysed, her mental capabilities are unimpaired. No party questions her eligibility to use the absentee ballot procedures. Her husband, Clark Courson, secured for her an absentee ballot without complying with the procedure required by K.S.A. 25-1125d(b) which requires an affidavit of assistance to be executed by those persons acting on behalf of another. Clark Courson then read the ballot to his wife and marked it as she wished but held no discussions with her prior to filing out her ballot and did not disclose, prior to marking her ballot, how he had voted. Since Virginia Courson is unable to sign her name in a legible fashion, Mr. Courson first tried to hold her hand and write her signature, which attempt resulted in a largely unintelligible scribbling in the place designated for inclusion of the voters name on the identifying declaration. As a result of this failure, Mr. Courson went ahead and completed the identifying declaration and signed his wife's name for her but identified it as being made by him.

The Court finds no evidence of any undue influence over the mind of the voter and that the ballot represented the exercise of her own free will. The complaints made with regard to this ballot are the failure to execute the appropriate assistance affidavits required by K.S.A. 25-1122d(b) and 25-1124(c). As in the case of the previous four absentee ballots there is no question as to the eligibility of this person to use an absentee ballot nor any evidence of fraud or wrong-doing in the handling or casting of this ballot and the testimony cured the apparent defects noted above.

The case of Lambeth v. Levins, at Syllabus paragraph 1, makes clear that under facts nearly identical to those found to exist by this Court that the disabled voter is entitled to have her ballot counted. This is particularly true in the absence of any evidence that the directions of the voter were not followed or any other proof of the invalidity of the ballot except for the failure to file the assistance affidavit required by law. This ballot shall therefore be opened and counted.

C. THE MAZIE TRAIL BALLOT (Contestant exhibit number 4). Mazie Trail is a 91 year old qualified elector residing in a portion of Lyon County which is within the 59th House of Representatives District. She is not personally known to the Lyon County Clerk but is on the permanently disabled absentee voter list maintained by the Clerk and automatically receives absentee ballots from the Clerk in each election.

The nature of Mazie Trail's disability is physical and has not effected her cognitive or mental abilities. She reads well but has some difficulty marking the ballot. In this effort she was assisted by her daughter, Mazie Beals, although no affidavit of assistance was filed by her daughter as required by K.S.A. 25-1124(c). Her daughter exercised no influence over the choices expressed by Mazie Trail and there is no evidence to support any claim that the ballot of Mazie Trail reflects anything other than her clear, conscious and considered choices on the matters voted upon.

Since Mazie Trail is largely confined to her home, upon the completion and signing of her ballot on the Sunday preceding the election, she gave the same to her daughter for delivery. The daughter forgot to deliver the same on the Monday preceding the election but remembered to do so on election day and at approximately 8:40 a.m. dropped the ballot in a "drop-box" provided at the south entrance to the Lyon County Courthouse as she had done in previous elections. Mrs. Trail's daughter knew of the obligation to have the ballot delivered prior to the close of the polls on election day but felt that she was fulfilling this obligation. The daughter did not deliver the ballot physically to any election officer in Lyon County. It is the use of this "drop-box" which gives rise to the question of whether this ballot should be counted.

Contestant's exhibits numbered 5 and 6 are photographs and accurately depict the exterior of the south

entrance to the Lyon County Courthouse and the drop-box in question. The sign above the box contains the notation "Courthouse Business Only - Not for U.S. Mail." There are no other limitations on its use nor are there any indications of the time or frequency of the removal of the items by courthouse workers.

The only person with a key to open the drop-box is the secretary to the Lyon County Board of Commissioners. She is not an employee or agent of the office of the Lyon County Clerk. It is the practice of this person that the box is opened only one time per day between 8:00 and 8:30 a.m. and the contents are then distributed to the appropriate county office. That practice was followed on election day on November 6, 1990 with the daily pick-up from the box made prior to the placement of the ballot in the drop-box by Mrs. Trail's daughter. As a consequence, the ballot was not discovered until the morning following the election and the ballot was delivered to the county election officer at 8:30 a.m. that day. The county election officer took the position that since she did not receive the ballot prior to the close of the polls and prior to the tabulation of the election results, the ballot should not be counted. The ballot has remained sealed and in the possession of the County Clerk prior to trial.

Wellman argues that except for the lack of an affidavit of assistance there is no irregularity concerning this ballot; that the placing of the ballot was a "constructive

delivery" to the election officer within the limitations of the statute; and, that the ballot should therefore be counted.

Wells contends that the facts should be construed to find that the drop-box is intended for use only during times other than regular business hours and that its use under these facts is not consistent with its purpose and therefore "not constructive delivery." Wells further contends there is nothing to indicate any election official misled Mrs. Trail's daughter into expecting that the ballot would reach the Clerk prior to the close of the polls and consequently the risk of non-delivery rests with the voter. In doing so, Wells argues that no voter has an absolute right to rely on third party delivery, but rather takes the risk of non-delivery when third party services are used. Wells also argues that the lack of the existence of an "on behalf of" affidavit executed by Mrs. Trail's daughter also invalidates this ballot.

The decision of the Kansas Supreme Court in Lambeth v. Levens, as noted earlier makes clear that a disabled voter who depends on the assistance given and has his ballot marked is entitled to have the same counted in the absence of proof that his directions were not followed. The only difference between the facts in Lambeth v. Levens and the present case is that there is absolutely no evidence in the present case of fraud or that the directions of Mrs. Trail were not followed. Hence the ballot should not be disqualified by reason of the failure of Mrs. Beals to attach the affidavit of

assistance.

The matter of delivery presents yet another issue. While the provisions of K.S.A. 25-1124(a) and K.S.A. 25-1128(b) impliedly authorize almost any form of transmission of the absentee ballot to the Clerk, there remains an obligation under K.S.A. 25-1132 that all absentee ballots must "reach" the county election officer prior to the close of the polls in order to be delivered to the special election board for counting.

As with any issue dealing with non-compliance involving an absentee ballot, there are two competing policy concerns. The first is the protection of the integrity of the voting process and insuring against efforts to tamper with an election. The proponents of this position would argue that the possibility of fraud or tampering is so great that under no circumstances should an absentee ballot be accepted if it did not physically reach the hands of the election officer prior to the close of the polls. The countervailing policy position promotes the privilege of an individual to vote even in the face of technical non-compliance with various election rules. This position is recognized in the various Supreme Court decisions previously noted which find that in the absence of fraud, technical non-compliance with directory election statutes may be disregarded.

There is no doubt that the ballot here failed to physically reach the county election officer prior to the close of the polls. Similarly, the Court has no hesitancy in finding

that an absentee voter who elects to have the ballot delivered by any means other than personally delivering the same, bears the risk of non-delivery no matter how innocent or compelling the reason for non-delivery may be.

The Court's concern is that by not limiting the use of the drop-box to non-election matters and accepting delivery from the drop-box of ballots on previous occasions, a reasonable person would be led to assume that delivery in the manner made in this case would be sufficient. However, the statute establishing the deadline for receipt of an absentee ballot (K.S.A. 25-1132) specifically provides that ballots must reach the county election officer not later than the hour of closing of the polls. This statute is not directory in nature but rather is mandatory and imposes no obligation on the election officer to seek out any number of places in which an absentee voter may have left the ballot or to provide special pick-up accommodations for those who chose to use a drop-box location intended for a multitude of other purposes. The instruction given the absentee voter (see Contestant's exhibit number 7) mirrors the terms of K.S.A. 25-1132 in that they explicitly require that the ballot reach the office of the election officer prior to the close of the polls on election day. It is the Court's opinion that notwithstanding the good faith of the voter or the person entrusted with delivery in this case, this statute is mandatory and does not allow for the counting of the ballot received after the close of the poll.

Thus, even though one might argue that the acts of Mazie Trail's daughter were in substantial compliance, that is not sufficient to overcome the compelling public interest represented by the mandatory statute.

To rule otherwise would open a virtual pandora's box of methods by which one might attempt to alter or effect the outcome of an election and would virtually insure election contests over matters of this type. Additionally, the Court would note that to rule otherwise would not enable the special election board, established in K.S.A. 25-1133, to complete its duties in counting these ballots timely at the close of the polls if the county election officer must first search a myriad of courthouse locations for possible absentee ballots which may have gone astray. This is particularly true when the evidence reflects that the County Clerk did not have access to the drop-box location until it was opened by a representative of another office in the courthouse.

The Court therefore orders that this ballot shall not be opened or counted.

10. BALLOTS NUMBERED 426, 427, and 428. The inspection board appointed by the Court for Osage County, upon a review of the ballots in Precinct 2 of Osage City found the following:

A. A total of 300 ballots for national and state office were sent to the polling place (see Contestee's exhibit number 5, page 16).

B. One Hundred Five (105) of these ballots were not used or voted. No ballots were spoiled by an elector. Therefore, 195 of the total ballots issued were used.

C. The poll book of this precinct reflected 195 persons casting ballots; however, during the initial phase of their review, the inspection board could locate only 192 ballots, thereby leaving three ballots unaccounted for.

D. Two of the missing ballots, now known as ballots number 426 and 427 had originally been discovered by the Osage county recount board within a manila envelope (identified now as addendum to ballots number 426 and 427) which on its face recites that it contains two national and state ballots not voted. This manila envelope was in turn found within a larger gray envelope (not presented to this Court as an exhibit) which is the storage envelope used for "void, objected to and challenged ballots" required pursuant to K.S.A. 25-3008(c)(d). The identifying number placed on each ballot at the time of delivery to the elector had been clipped (see K.S.A. 25-2905) from the upper right hand corner of these two ballots prior to their observation by the recount board. However, these ballots had not been "strung" pursuant to the process described in K.S.A. 25-3003, thereby indicating they had not been counted, but rather had been treated as void, objected to, or challenged ballots.

This Court's examination of these two ballots reveals that neither ballot was spoiled, as defined by K.S.A.

25-2902(b). It is unfortunate that the election board of this precinct did not follow the procedure for the handling and marking of either an "objected to" ballot as prescribed by K.S.A. 25-2902 or a "challenged" ballot pursuant to K.S.A. 25-409.

This Court does find that since the ballots were not found in a special "challenged" envelope as required by K.S.A. 25-409 it is more probably true than not true that they were considered by the election board as "objected to" ballots. This Court has examined these ballots and finds no marks, tears, obliterations, or other unlawful acts done to the ballot which would have caused them to be objectionable and therefore orders the same to be counted. The Court further notes that ballot number 427 does not have any vote declared for the position at issue in this case and therefore this ruling effects only the vote recorded on ballot number 426.

E. The third and final missing ballot, now known as ballot number 428, was found intermingled in a previously opened container for ballots used in state judicial positions. This ballot did have the identifying number clipped from the upper right hand corner but again was not strung. No explanation was offered as to why this ballot was placed with the unused state judicial ballots in this precinct, but its existence is necessary in order to account for all ballots issued to voters in this precinct.

Again the Court emphasizes that there was no evidence of fraud or wrong doing occurring in connection with this election offered by either party and the most logical explanation was that this ballot was simply mis-handled by either the election board or the recount board in its storage. No examination of the ballot was made by the Court's inspection board and it has remained sealed, without disclosure. The Court finds no compelling reason to consider it to be an invalid ballot, the Court orders the same to be opened and to be counted.

12. BALLOT NUMBER 528 (telefaxed ballot). Ballot number 528 is not an original ballot. It appears to be a copy of an original ballot which was electronically transmitted, commonly referred to as a "fax" copy. Upon this fax copy, the votes were marked with blue ink. This ballot was apparently counted, and not challenged or objected to by either the election board or the recount board. No evidence was offered by either party as to this ballot, but the ballot is obviously irregular on its face since it is not an original ballot.

Wells suggests, albeit based on proffered testimony along, that this ballot was properly handled pursuant to the provisions of the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. 1973 ff, et. seq., and the regulations established by the United States Department of Defense Federal Voting Assistance Program. Wellman argues that there is no evidence to support a conclusion as to who voted this ballot and whether that person would have been eligible to use a faxed ballot under the statute and regulations noted above.

However, one indispensable fact remains. That is that the ballot was not challenged or objected to by either the special election board or the recount board. Ordinarily this fact would control since a challenge to the right to vote must be made at the time a vote is cast. (See Lambeth v. Levins, at page 618.) However, the challenge here is not to the right to cast the absentee ballot, but to the manner in which it was done. This Court has no evidence regarding this particular ballot which supports its legality. In the absence of the same the Court will not presume its validity and therefore orders the same not to be counted.

This is not to say that evidence of the regularity of this ballot and the legality of the manner in which it was cast does not exist. Wells has requested an opportunity for the presentation of evidence concerning this ballot and such could provide the necessary information in order to sustain its validity. However, there must be some note of finality to these proceedings; in light of the need for the immediate resolution as to the elected representative in the 59th House District, the Court will not delay further for the receipt of this information. The House of Representatives may feel free to do so if the same becomes available.

13. **BALLOT NUMBER 100.** During the trial and oral arguments of this case, the Court ruled that ballot number 100 did not contain an identifying mark which would have precluded its being counted pursuant to the provisions of K.S.A. 25-3002.

The Court has had a further opportunity to examine this ballot and reconsider its decision.

Osage County elector Lawrence Temple made two errors in marking his ballot in the governor and state treasurer contests. To correct the errors, he wrote the word "error" by the incorrect marks and affixed his initials in two places for the purpose of showing that it was he who had made the writings upon the ballot and not some other person. Mr. Temple then made his correct choice in each of these two races.

In this Court's oral decision, it emphasized the good faith of the voter and that his interest in making the mark was to insure that no one would later assume that this ballot had been tampered with. The Court did not believe his intent in applying his initials to the ballot was to communicate to anyone his voting choices. The Court therefore inferred that without the intent to make this an identifying mark, the ballot should be counted.

In retrospect, this Court concludes that it erred in its oral decision. K.S.A. 25-3002(b)(2) voids any ballot upon which an identifying mark has been made. This statute does not require a demonstration that the mark be made intentionally, in bad faith, or in any attempt to manipulate the election. It is difficult to conceive of any more clear identifying mark than the use of one's initials and therefore this Court rules that said ballot should not be counted even though the Court does not question the good faith of the elector in so doing.

14. Following the rulings made hereinbefore in this decision, the Court has opened and counted previously sealed ballots as noted. The Court determines that of these ballots 5 votes were cast for Wells, 3 votes were cast for Wellman, and 4 should not be counted.

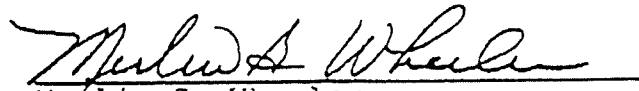
In order to preserve the secrecy of the vote of each person identified by name herein, the Court has intentionally co-mingled these results and publicly reported the total only. Appended to this decision in a sealed envelope is an appendix listing the manner in which each of said ballots was cast and any other rulings made by the Court upon the examination of each ballot. This appendix may be released for public disclosure only upon the order of this Court or the House of Representatives of the State of Kansas. The parties shall receive a copy of this Appendix and be entitled to review the same, but shall not disclose the same publicly, except upon order of either this Court or the House of Representatives.

15. The addition of the votes cast for each candidate as noted in the previous paragraph to that made by the inspection board and augmented by the oral decisions of this Court reveals a total of 3485 legal votes cast for Wells and 3480 legal votes cast for Wellman. The candidate Elaine Wells, having received a majority of the legal votes cast is therefore declared the recipient of the greatest number of legally cast votes of the two candidates to this contested office. It is therefore the recommendation of this Court to the House of Representatives

that Elaine L. Wells be seated as the representative of the 59th House of Representative District for the State of Kansas.

16. This memorandum decision shall serve as the order of the Court and shall be effective upon its filing with the Clerk of the District Court of Osage County. No additional Journal Entries or enabling orders are required.

Dated this 14th day of January, 1991.


Merlin G. Wheeler
District Judge

CERTIFICATE OF SERVICE

The undersigned, hereby certifies that a copy of the above and foregoing Memorandum Decision was delivered to the following named persons by facimile and a copy of the same was deposited in the United States Mail, postage prepaid on this 14th day of January, 1991:

Ronald R. Hein, Hein & Ebert, Chtd., 5845 S.W. 29th Street, Topeka, KS 66614; and

Mr. Vic Miller, Attorney at Law, 700 Jackson, Suite 404, Topeka, KS 66603.


Karen L. Scott
Secretary to Judge Wheeler

JAN 23 1990
Attach. 5

HEIN AND EBERT, CHTD.

ATTORNEYS AT LAW

5845 S.W. 29th, Topeka, Kansas 66614

Telefax 913/273-9243

913/273-1441

Ronald R. Hein
William F. Ebert
Steven D. Rosel

January 18, 1991

Rep. Bill Roy, Jr.
c/o Speaker Marvin Barkis
Room 380-W, State Capitol
Topeka, KS 66612

VIA TELEFAX
296-0251

RE: Wellman v. Wells
Case No. 90-CV-87
Our File No. 3288.001

Dear Bill:

Please find enclosed a list of the ballots and issues which I
desire to be addressed pursuant to the Select Committee's request.

Sincerely,

HEIN AND EBERT, CHTD.



Ronald R. Hein

RRH/lj
Enclosure
cc: Mr. Vic Miller (via telefax)

HSCEC
1-22-91
Attachment 5

CONTESTEE'S BALLOTS--COURT RULING IMPROPER

Ballot #100 Not an identifying mark (K.S.A. 25-3002(b)(2))

Ballot #123 voter changed name; challenged ballot; both parties argued that ballot should be counted; name change law unconstitutional

Ballot #528 Original of telefaxed ballot; permitted by law; improperly excluded; no evidence offered by contestant

Contestee's Rebuttal Ballots
(in response to contestant's ballots)

Ballot #272, Ballot #403, Ballot #424, Ballot #495, Ballot #598, Ballot #616 and Ballot #623
(Same issue as Ballot #59); contestee alleges intent clear; but if Ballot #59 is excluded, Ballot #272, Ballot #403, Ballot #424, Ballot #495, Ballot #598, Ballot #616 and Ballot #623 should be excluded as well

Ballot #314 (Same issue as Ballot #156); contestee alleges intent clear; but if Ballot #156 is excluded, Ballot #314 should be excluded as well

Ballot #50, Ballot #79, Ballot #87, Ballot #173 and Ballot #381
(Same issue as Ballot #166); contestee alleges intent clear; but if Ballot #166 is excluded, Ballot #50, Ballot #79, Ballot #87, Ballot #173 and Ballot #381 should be excluded as well

Ballot #62 (Same issue as Ballot #426 and Ballot #428); Ballot #62 was not strung; evidence was offered on all three ballots, contrary to contestant's allegation on ballot list; if Ballot #426 and Ballot #428 are excluded, Ballot #62 should be excluded as well

Ballot #146, Ballot #302 and Ballot #454
(Same issue as contestant's Ballot #492 and Ballot #493); if Ballot #492 and Ballot #493 are excluded, Ballot #146, Ballot #302 and Ballot #454 should be excluded as well

Ballot #568, Ballot #570, Ballot #613, Ballot #632, Ballot #635, Ballot #639, Ballot #644
(Same issue as contestant's Ballot #552); if Ballot #552 is excluded, Ballot #568, Ballot #570, Ballot #613, Ballot #632, Ballot #635, Ballot #639, Ballot #644 should be excluded as well

Ballot #532 (Same general issue as Contestant's Ballot #122, Ballot #529, Ballot #530, Ballot #531 and Ballot #533--technical irregularity); if Ballot #122, Ballot #529, Ballot #530, Ballot #531 and Ballot #533 are excluded; then Ballot #532 should be excluded as well

Testimony of Elaine Wells before the Select Committee in meeting assembled at the State Capitol Building, Room 154-E on January 22, 1991.

Thank you Mr. Chairman. I'd like to respond briefly.

After election night I asked for a recount because of the experience I had with my first election 4 years ago, won by 25. A recount was done, approximately a dozen votes in different precincts were changed, especially in Lyon County which has machine voting.

Just as I didn't expect to win the election 4 years ago, I had little hope that this recount would reverse the outcome. But 18 votes had never been recorded by the machine election night in Lyon County. After 8 hours of a bi-partisan board's efforts, the election night results were changed.

The recount was performed by an impartial board. The lawsuit was done by, according to a quote from Mrs. Jones, a "neutral party". He was fair and tedious in his deliberations and decisions as was the recount board. After a week-long trial, which I'm sure neither of us ever want to go through again, the count remained in my favor. This time by even more votes.

I have been sworn in and seated and the public knows of the length to which the case has gone already. Many even question the power of the Legislature to overturn the judge's ruling and that of the recount board, describing it as a possible travesty to our democratic system if it should happen. A senator told me last week that I should be asking House members for their votes. It is beyond the realm of reality that either I or Mrs. Jones should have to lobby for an elected position in the Legislature.

After you hear the arguments presented by both counsels, I am hopeful and very confident that you will do what is reasonable and fair by accepting the findings of a week-long trial and the results of a day-long recount performed by 2 recount boards, 10 impartial judges, rather than reversing the decision after only one afternoon of hearings.

This election has had its toll on many of us. The district has had enough bickering and arguing presented to them. Many were

involved in being dragged into testifying in court and even here today. This "negative" process has robbed the district of effective representation for the start of the '91 session. It's been a costly process to the state, to the district, and to our personal and private lives.

What you do here today and tomorrow is setting history. Up to this point the outcome of the process has been fair, impartial, and non-partisan. I'm only asking that it remain so. I know and believe that Ron's testimony has supported my winning the election allowing me to retain the 59th District House seat, with the addition of the Dessert Shield Fax Ballot to make the winning count 6.