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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001687-MR

CAROLYN SCOTT,
GREEN COUNTY COURT CLERK APPELLANT

v.

APPEAL FROM GREEN CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 07-CI-00186

BOARD OF EDUCATION OF
GREEN COUNTY, KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, STUMBO, AND VANMETER, JUDGES.

STUMBO, JUDGE: Carolyn Scott, Green County Court Clerk, appeals from an Order of the Green Circuit Court granting Summary Judgment in favor of the Board of Education of Green County, Kentucky. Scott contends that the circuit court erred in determining that documents filed with her office for the purpose of

initiating the process to place a property tax recall on the ballot failed to meet the statutory guidelines set out in KRS Chapter 132. She maintains that the filing and the procedural process which followed it substantially complied with the statutory requirements and should operate to place the tax issue on the ballot. For the reasons stated below, we affirm the Order on appeal.

On August 27, 2007, the Green County Board of Education proposed to increase the then-existing Green County real estate and personal property tax rate of $ 0.059 to $ 0.444 per $100.00 of valued property. After a public hearing, the Board unanimously voted to increase the tax to the proposed rate.

A group of Green County, Kentucky citizens, hereinafter referred to as the "petition committee," subsequently initiated an effort to place the proposed tax increase issue on the ballot in accordance with the provisions of KRS Chapter 132. As part of that effort, the petition committee, which consisted of seven members, filed a document with Court Clerk Scott indicating that it wished to initiate a petition to place the tax on the ballot pursuant to KRS 132.017. A notice of challenge was then published in a local newspaper as required by statute. Thereafter, the petition committee collected over 1,000 signatures and gave the petition to Scott on October 27, 2007. After determining that the petition contained the minimum number of signatures required by statute, Scott advised the Board by way of letter dated November 10, 2007, that the measure would be placed on the ballot of the next regularly scheduled election.

The Board filed the instant action in Green Circuit Court, in which it claimed that the filing failed to meet the statutory guidelines for placing the tax recall on the ballot. The matter proceeded in circuit court, whereupon both parties filed motions for Summary Judgment. After written arguments were tendered, the court rendered an Order on June 27, 2008, sustaining the Board's motion and granting Summary Judgment in its favor. It held in relevant part that the filed documents failed to comply with the statutory requirements for a number of reasons, including its reference to "a nickel" tax increase rather than the actual 5.9% increase, and its failure to reference the Green County School Board. Scott's motion to alter, amend or vacate the Order was overruled on August 11, 2008, and this appeal followed.

Scott now maintains that the Green Circuit Court erred in sustaining the Board's motion for Summary Judgment. She argues that the document was in substantial compliance with the requirements set out in KRS 132.017, that the essential purpose of the statute was met, and that the circuit court erred in failing to so find. Scott also argues that pursuant to KRS 132.017(2)(b), the court's review of the petition's sufficiency shall be limited to a recognition of the County Clerk's determination that the petition was sufficient. She argues that Summary Judgment in favor of the Board was not warranted, and seeks an Opinion reversing the Order on appeal with instructions to enter a Judgment in her favor. In response, the Board contends that the circuit court correctly determined that the filing failed to

comply with KRS Chapter 132 and that the entry of Summary Judgment was therefore proper.

After careful consideration of the record, the written arguments and the law, we find no error in the Order on appeal. KRS 132.017(2)(b) states that,

> During the forty-five (45) days next following the passage of the ordinance, order, resolution, or motion, any five (5) qualified voters who reside in the area where the tax levy will be imposed may commence petition proceedings to protest the passage of the ordinance, order, resolution, or motion by filing with the county clerk an affidavit stating that they constitute the petition committee and that they will be responsible for circulating the petition and filing it in the proper form within forty-five (45) days from the passage of the ordinance, order, resolution, or motion. The affidavit shall state their names and addresses and specify the address to which all notices to the committee are to be sent. Upon receipt of the affidavit, the county clerk shall:
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> 1. At the time of filing of the affidavit, notify the petition committee of all statutory requirements for the filing of a valid petition under this section;
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> 2. At the time of the filing of the affidavit, notify the petition committee that the clerk will publish a notice identifying the tax levy being challenged and providing the names and addresses of the petition committee in a newspaper of general circulation within the county, if such publication exists, if the petition committee remits an amount equal to the cost of publishing the notice determined in accordance with the provisions of KRS 424.160 at the time of the filing of the affidavit. If the petition committee elects to have the notice published, the clerk shall publish the notice within five (5) days of receipt of the affidavit; and
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> 3. Deliver a copy of the affidavit to the appropriate local governmental entity or district board of education.

In the Order on appeal, the Green Circuit Court determined that the filing failed to comply with several of the requirements set out in KRS Chapter 132. It also concluded that the petition was little more than a collection of signatures without reference to what the signatories were asserting. We find no error in these conclusions. The original filing with the Clerk does not set out the petition committee's address for notices, nor state that the committee will be responsible for circulating it and filing it in the proper form. Also, and as the circuit court properly noted, the statute calls for the Clerk to publish a notice "identifying the tax levy being challenged" in a newspaper. The record indicates that the notice was published by the petition committee rather than the Clerk, and the petition failed to correctly identify either the Green County School Board or the tax which the committee sought to challenge. It cryptically stated that, "[T]his tax levy is the recall of a nickel by the School Board." The actual tax represented an increase by 5.9 cents, not "a nickel;" the tax is not a recall, but rather the committee is seeking to recall the tax; and, the "School Board" is not identified as that of Green County, Kentucky. We agree with the circuit court's conclusion that it "cannot be expected that the general public would understand what this notice was promoting."

We also find no error in the circuit court's determination that the document purporting to be a petition does not actually constitute a petition. The circuit court points to the Black's Law Dictionary definition of a petition as "a

formal written request presented to a court or other official body." While Scott did introduce into evidence a page stating that it was a petition "to give the people in Green County the opportunity to express their opinion on the nickel tax . . . ," the Board did not propose a "nickel tax" and the circuit court found it implausible that this single page had circulated to each of the several locations where the signatures were collected. Further, the signature pages were simply collections of signatures without any indication as to what the signatory was affixing his or her name.

The overarching flaw in the petition, however, is its failure to accurately state that it was seeking a recall vote on the Board's 5.9 cent tax increase. Its reference to a "nickel tax" does not reasonably inform the citizenry of the subject matter the petition committee apparently sought to place on the ballot. Scott contends that the affidavit and subsequent petition substantially complied with the statutory requirements, and that any minor issues of non-compliance with those requirements should not divest the public of its right to resolve the matter via the ballot. KRS 132.017(2)(b), however, uses the mandatory word "shall" regarding the procedural requirements necessary to place the issue on the ballot. The apparent legislative purpose of the statutory elements and the mandatory "shall" language is to reasonably apprise the signatories to the petition of the nature of the petition and to accurately describe what it is they are seeking to place on the ballot. The word "shall" is mandatory language, and the rules of statutory

construction require that we carry out the intent of the legislature. *Hardin County Fiscal Court v. Hardin County Bd. of Health*, 899 S.W.2d 859 (Ky. App. 1995).

Lastly, we are not persuaded by Scott's contention that the circuit court improperly exceeded the scope of its review by adjudicating the instant issue. KRS 132.017(2)(h) states that, "[A] final determination of the sufficiency of a petition shall be subject to final review by the Circuit Court of the county in which the local governmental entity or district board of education is located, and shall be limited to the validity of the county clerk's determination." While there is no Kentucky case law interpreting this provision, the circuit court's adjudication of the Board's motion for Summary Judgment is properly characterized as rejecting "the validity of the county clerk's determination" that the petition complied with KRS Chapter 132. Any judicial review of a KRS 132.017 proceeding which does not examine the sufficiency of the petition is at best an illusory review, and we cannot conclude this is what the General Assembly intended via its enactment of KRS 132.017(2)(h). Accordingly, we find no error.

For the foregoing reasons, we affirm the Order of the Green Circuit Court granting the Board's motion for Summary Judgment.

KELLER, JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS IN RESULT, AND FILES SEPARATE OPINION.

VANMETER, JUDGE, CONCURRING: While I concur in the majority opinion, I write to add that the initiating document required by KRS

132.017(2)(b) is an affidavit by five qualified voters. Under CR 43.13(1), "[a]ffidavits authorized or permitted under these rules, or in any statutory proceedings, shall be a written statement or declaration sworn to or affirmed before an officer authorized to take depositions by Rule 28." In addition to the other deficiencies in the procedures delineated in the majority opinion, the initiating document in this case in no way can be considered an affidavit.

While County Clerk Scott argues that the doctrine of substantial compliance should be used to validate the election process, the most recent Kentucky Supreme Court decisions indicate that the Court has rejected application of the substantial compliance rule insofar as it may apply to the process of gaining access to the ballot. *See Barnard v. Stone*, 933 S.W.2d 394 (Ky. 1996) (a registered voter could not authorize another person to sign nominating petition on voter's behalf since strict compliance with election laws is required); *Morris v. Jefferson County Clerk*, 729 S.W.2d 444 (Ky. 1987) (rejecting claim of substantial compliance in case in which candidate failed to obtain affidavit of two registered voters on his nominating petition as required by statute); *Thomas v. Lyons*, 586 S.W.2d 711, 716 (Ky. 1979) (noting that application of substantial compliance to permit candidate's name to appear on ballot, when he had only obtained 90 of required 100 signatures on nominating petition, would result in impermissible amendment of the statute). As noted by the Kentucky Supreme Court in *Morris*, "[t]he statute, with regard to the supporting affidavits of electors, is plain. It

requires two affiants, and it is easy to comply with. An affidavit of only one elector is not a substantial compliance with the statute." 729 S.W.2d at 446.

In this instance, KRS 132.017(2)(b), having mentioned the word "affidavit" eight times, is plain and easily satisfied: the affidavit of five voters is required in order to initiate a valid recall petition proceeding. The failure to comply with the statutory prerequisite was fatal to the attempted property tax recall.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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