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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001622-MR

PAUL METZGER; JUDTIH TOEBBEN; DIANE ST. ONGE; MARY KIMBERLIE BESSLER; ROSEANN ARLINGHAUS CROXSON; WILLIAM TERWORT; AND THE HOME BUILDERS ASSOCIATION OF NORTHERN KENTUCKY, INC.

APPELLANTS

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 11-CI-02355

GABRIELLE SUMME, KENTON COUNTY CLERK; AND KENTON COUNTY FISCAL COURT

APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON, AND STUMBO, JUDGES.

CAPERTON, JUDGE: Appellants appeal the trial court's summary judgment order entered in favor of Appellees, the Kenton County Fiscal Court and Gabrielle Summe, the Kenton County Clerk. At issue before the trial court was whether the Appellants had provided sufficient signatures on a petition to dissolve the Northern Kentucky Area Planning Commission ("NKAPC") in accordance with Kentucky Revised Statutes (KRS) 147.620(4) through a referendum to be placed on the November 2011 ballot. Summe had concluded that the petition did not meet the requirements established by KRS 147.620(4); thus, the matter was never placed on the ballot. The trial court concluded Summe and the fiscal court were entitled to summary judgment based on KRS 147.620(4), to which Appellants disagree. After a thorough review of the record, the parties' arguments, and the applicable law, we affirm.

This case arises from the efforts to dissolve the Northern Kentucky Area Planning Commission in accordance with KRS 147.620(4). Per this statute, a petition was circulated and presented to the Kenton County Clerk, Gabrielle Summe, on August 8, 2011. In order to sign the petition, the voter had to print his or her name, date, provide a signature, and address. The petition sought to have Summe place a referendum on the November 2011 ballot. Summe declined to do so and the Appellants filed suit on September 8, 2011, for declaratory and injunctive relief. The complaint sought to have the trial court order Summe to verify the validity of the signatures on the petition.[1]

[1] The complaint also sought injunctive relief and requested the court to enter an order prohibiting the Kenton County Fiscal Court from printing the November 2011 ballot until the certification

On October 31, 2011, Summe and the Kenton County Fiscal Court filed their initial motion for summary judgment. After a hearing, the trial court denied the initial motion for summary judgment on February 6, 2012. The order directed Summe to reconsider the petition as Summe had acknowledged to the court that some errors had been made in the original validation and count of the signatures.[2] Summe was ordered to report to the court the results of her reconsideration.

In the February 6, 2012, order the trial court noted that KRS 147.620 requires that the petition be signed by at least 25% of the number of registered voters who voted in the last presidential election in order for the referendum to be placed on the ballot. Summe determined that the required number of signatures was 17,491.[3] The court noted that the statute additionally requires that the signatures on the petition be dated, with the last no later than 90 days after the first. However, KRS 147.620(4) does not prescribe a method to be used by the clerk in determining the validity of the signatures on the petition, only that the petition is in proper order. The court thus did not prescribe any specific manner by which Summe was to review her tally of the signatures on the petition.

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process of its petition was completed. The trial court declined to enter said order. This matter is not before us on appeal.

[2] Appellants contend that Summe admitted that she used the same process in both the first and the second review. Summe states that the second review was more consistent as it was not time-constrained by an election deadline.

[3] The parties do not contest this figure.

On June 22, 2012, Summe filed her report with the court detailing the findings and results of the petition review and reconsideration. In this report Summe declared that yet again the petition failed to include the required number of valid signatures, for two reasons. First, she found that only 14 signatures were dated within 90 days of the first. Summe found that the earliest signature was dated February 5, 2011, and the majority of the signatures were dated between May 10, 2011, and August 8, 2011. Second, even if all of the signatures were included, the petition only contained 15,098 valid signatures of registered Kenton County voters.

Appellants argued before the trial court that this conclusion was in error as Summe was arbitrarily requiring that the signature had to have a matching Kenton County address between the petition and the voter registry and did not take into account the possibility that a voter could move within the county and not have a matching address between the voter registry and the address listed on the petition but would still be a Kenton County voter. Summe highlighted these entries pink on the petition.[4] On July 3, 2012, a hearing was held before the trial court regarding Summe's report. Appellants were given the opportunity to question Summe regarding the second review of the petition. Thereafter, both parties filed motions for summary judgment.

The trial court in its August 30, 2012, order granting summary judgment to Summe and the Kenton County Fiscal Court concluded that the

[4] While varying numbers were reported for these pink entries, presumably the pink entries, if counted, would make the petition have enough signatures to place the issue on the ballot.

provisions of KRS 147.620 were clear, plain, and unambiguous, that persons signing the petition must be registered voters living in the areas of the planning commission territory and that the signatures shall be dated, the last no later than 90 days after the first. Summe found that only 14 signatures were within the 90-day window from the first date. The court disagreed with the position argued by the Appellants that the 90-day window in the statute was directory and not mandatory. Instead, the court agreed with Summe that the number of valid signatures within the time frame fell short of the requirement of the statute and thus the clerk was correct that the petition failed.

The court then discussed Summe's second reason for the petition failing to meet the requirements of KRS 147.620 - the petition failed to contain 25% of the registered voters from the 2008 presidential election. Appellants contested Summe's methodology in determining the validity of the signatures on the petition. Appellants argued before the trial court that the petition contained more than enough valid signatures to have the issue placed on the ballot. The trial court, in reliance upon *Howell, infra,* concluded that as the statute did not proscribe the method Summe was to undertake, it was not for the court to mandate a method either:

> As stated in 18 Am.Jur., Elections, sec. 102, p. 244:
> 'There is no presumption that the signers of a petition are qualified electors, and in the absence of any provision of law to the contrary, the duty of determining whether a petition presented is in accordance with the requirements of law falls upon the officers to whom it is presented and who are to call the election.'

Howell v. Wilson, 371 S.W.2d 627, 630 (Ky. 1963).

Thus, the court concluded that to order Summe to undertake a different methodology would violate the separation of powers doctrine. The court also concluded that Summe's interpretation of the statute was entitled to deference, just as an administrative agency is entitled to deference in its interpretation of statutes it is charged with implementing. The court noted that in such a review, the judiciary intervenes when the executive or legislative branch of government acts in an arbitrary manner. The court was of the opinion that Summe's methodology in reviewing the petition was not discriminatory or arbitrary. On two occasions, Summe and her staff performed a lengthy and thorough examination of the petition and the Appellants failed to establish that the review was conducted in an arbitrary or discriminatory manner. Thus, the court granted Summe and the Kenton County Fiscal Court's motion for summary judgment and denied the Appellants' competing motion for summary judgment. It is from this order that Appellants now appeal. Further facts will be discussed as warranted.

On appeal, Appellants argue: (1) Summe applied the wrong standard in reviewing KRS 147.620(4); (2) Summe violated Section 2 of the Kentucky Constitution by excluding all of the pink entries and rejecting the entire petition based on a few wrong dates. In support of this second argument Appellants additionally argue: (1) Summe violated Section 2 by adding a "matching address" requirement to the statute; and (2) Summe violated Section 2 by adjudicating pink

entries as being individuals who are not registered to vote in Kenton County. Finally, as their third basis for appeal, Appellants assert that the trial court erred by denying Appellants the right to conduct discovery.

In response, the Appellees argue: (1) KRS 147.620 charges the county clerk with the task of verifying and validating the petition and the clerk acted consistently with the statutory authority conferred to her office and, thus, the judiciary must defer to and uphold her process and decision; (2) the clerk did not apply the wrong standard in reviewing KRS 147.620; (3) Appellants cannot pursue a private cause of action against the clerk for a violation of Section 2 of the Kentucky Constitution;[5] (4) assuming arguendo that Appellants can bring a claim under Section 2, the court's judgment should nevertheless be affirmed because the clerk's actions were not arbitrary; (5) the court correctly found that Appellants failed to meet the 90-day requirement under KRS 147.620; and (6) the court did not err in holding discovery in abeyance.

We believe that the numerous arguments may be condensed into two issues: (1) whether the trial court properly granted summary judgment, which necessarily requires an analysis of KRS 147.620, and whether Summe's refusal to certify the petition to the fiscal court was arbitrary and unreasonable in accordance with Section 2 of the Kentucky Constitution; and (2) whether the trial court erred

[5] Our review of this appeal shows that Appellants are not seeking damages from a private cause of action involving Section 2 of the Kentucky Constitution; instead, they are seeking relief from what they perceive to be an arbitrary use of power by an elected official. Thus, this argument is without merit and we decline to further address it.

in holding discovery in abeyance. With these arguments in mind we turn to our applicable jurisprudence.

At the outset we note that the applicable standard of review on appeal of a summary judgment is, "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.* However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson,* 841 S.W.2d 169, 171 (Ky. 1992), citing *Steelvest, supra*. *See also O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); *Hallahan v. The Courier Journal,* 138 S.W.3d 699, 705 (Ky. App. 2004).

Since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001). With this in mind we now turn to the issues raised by the parties.

First, we must assess whether the trial court properly granted summary judgment, which necessarily requires an analysis of KRS 147.620 and whether Summe's refusal to certify the petition to the fiscal court was arbitrary and unreasonable in accordance with Section 2 of the Kentucky Constitution.

At issue, KRS 147.620(4) states in part:

> (4) An area planning commission may be dissolved by a referendum as follows:
>
> (a) Persons seeking dissolution of the commission shall submit a petition to the county clerk signed by at least twenty-five percent (25%) of the number of registered voters who voted in the last presidential election.
>
> (b) The petition shall be in substantially the following form: "The undersigned registered voters as determined by subsection (4)(a) of this section, living within the area planning commission territory (and containing a description of the territory) hereby request that the question of the dissolution of the commission be put to a referendum." The petition shall conspicuously state in laymen's terms that any legal obligations of the commission must be satisfied before the commission can be dissolved and that citizens residing within the area planning commission territory shall be responsible for the satisfaction of any such obligations. *Signatures on the petition shall be dated, the last no later than ninety (90) days after the first.*

> (c) If the county clerk determines that the petition is in proper order, he shall certify the petition to the fiscal court. The fiscal court shall direct that the question be placed on the ballot at the next regular election if the question is submitted to the county clerk not later than the second Tuesday in August preceding the regular election. The fiscal court shall bear the costs of advertising and placing the question on the ballot.
> (d) The county clerk shall advertise the question as provided in KRS Chapter 424 and shall prepare the question for the ballot. The ballot shall contain the following admonition to the voter: "The (name of the area planning commission) may have existing legal obligations which must be satisfied before the commission can be dissolved. The citizens residing within the area planning commission territory shall be responsible for the satisfaction of any obligations." The question of the dissolution of the commission shall be placed on the ballot in substantially the following form: "The (name of the area planning commission and containing a description of the commission's territory) should be dissolved." The voter shall vote "yes" or "no."…

KRS 620(4)(a)-(d)(emphasis added).

While the parties argue extensively over whether Summe is entitled to deference in her interpretation of the statute,[6] we believe that this matter is

[6] This Court has stated:

> The interpretation of a statute is a matter of law. *Commonwealth v. Garnett*, 8 S.W.3d 573, 575–6 (Ky. App. 1999). However, while we ultimately review issues of law de novo, we afford deference to an administrative agency's interpretation of the statutes and regulations it is charged with implementing. *Board of Trustees of Judicial Form Retirement System v. Attorney General of Com*., 132 S.W.3d 770, 787 (Ky.2003); *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.,* 467 U.S. 837, 843–845, 104 S.Ct. 2778, 2782–2783, 81 L.Ed.2d 694 (1984) (If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute).

reviewed *de novo*, "Because the construction and application of statutes is a question of law, it is subject to de novo review on appeal." *Sheffield v. Graves*, 337 S.W.3d 634, 638 (Ky. App. 2010), citing *Bob Hook Chevrolet Isuzu, Inc. v. Com., Transportation Cabinet*, 983 S.W.2d 488, 490 (Ky.1998). Regarding the proper interpretation of KRS 147.620(4),

> "All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature[.]" Unless directed otherwise, courts interpret election statutes liberally in favor of citizens whose right to vote they tend to restrict. *See Queenan v. Mimms*, 283 S.W.2d 380, 382 (Ky.1955), and *Greene v. Slusher*, 300 Ky. 715, 722, 190 S.W.2d 29, 33 (1945).

Daviess County Public Library Taxing Dist. v. Boswell, 185 S.W.3d 651, 658 (Ky. App. 2005).

In *Kentucky Milk Marketing and Antimonopoly Com'n v. Kroger Co.,* our Supreme Court discussed Section 2 of the Kentucky Constitution:

> Section 2 of our Constitution is simple, short and expresses a view of governmental and political philosophy that, in a very real sense, distinguishes this republic from all other forms of government which place little or no emphasis on the rights of individuals in a society. It is as follows:
>
> "§ 2. Absolute and arbitrary power denied. *Absolute and arbitrary power* over the lives, liberty and *property of free men exists nowhere in a republic, not even in the largest majority.*" (Emphasis added).

Commonwealth, ex rel. Stumbo v. Kentucky Public Service Com'n, 243 S.W.3d 374, 380 (Ky. App. 2007). We note *sub judice* Summe is not an administrative agency charged with implementing statutes and regulations; thus, we do not believe that we must afford her interpretation deference. Moreover, "The county court clerk is a ministerial officer and this statute does not clothe him with judicial authority." *Bogie v. Hill*, 286 Ky. 732, 151 S.W.2d 765, 767 (1941).

> While there are numerous cases which have been decided on the basis of this bulwark of individual liberty, the number is relatively few, in view of its potential importance to our jurisprudence.
>
> Section 2 is a curb on the legislature as well as on any other public body or public officer in the assertion or attempted exercise of political power. *Sanitation Dist. No. 1 v. City of Louisville*, 308 Ky. 368, 213 S.W.2d 995 (1948). Whatever is contrary to democratic ideals, customs and maxims is arbitrary. Likewise, whatever is essentially unjust and unequal or exceeds the reasonable and legitimate interests of the people is arbitrary, *Id*. No board or officer vested with governmental authority may exercise it arbitrarily. If the action taken rests upon reasons so unsubstantial or the consequences are so unjust as to work a hardship, judicial power may be interposed to protect the rights of persons adversely affected. *Wells v. Board of Education of Mercer County*, Ky., 289 S.W.2d 492, 494 (1956). Our function is to decide a test of regularity and legality of a board's action by statutory law and by the constitutional protection against the exercise of arbitrary official power. *Id.*
>
> Section 2 is broad enough to embrace the traditional concepts of both due process of law and equal protection of the law. *Pritchett v. Marshall,* Ky., 375 S.W.2d 253, 258 (1963). Unequal enforcement of the law, if it rises to the level of conscious violation of the principle of uniformity, is prohibited by this Section. *City of Ashland v. Heck's, Inc*., Ky., 407 S.W.2d 421 (1966); *Standard Oil v. Boone County Bd. of Sup'rs,* Ky., 562 S.W.2d 83 (1978). The question of reasonableness is one of degree and must be based on the facts of a particular case. *Boyle Cty. Stockyards Co. v. Commonwealth, etc*., Ky.App., 570 S.W.2d 650 (1978).

Kentucky Milk Marketing and Antimonopoly Com'n v. Kroger Co., 691 S.W.2d 893, 899 (Ky. 1985).

Sub judice, we must assess Summe's actions in light of Section 2 and the ultimate question of reasonableness. In reviewing the 24,301 signatures on the

petition, which Summe reviewed twice, Appellants state that in the first review, Summe included all signatures that were registered as a voter in Kenton County but whose address did not match that on the petition. Summe stated that she intended to conduct further review on those entries. In her second review, Summe discarded each and every one of these signatures, which she highlighted pink[7] on the petition. Summe states that in the second review, particular attention was given to the signer's information in the database at the time he/she signed the petition, as the clerk recognized that registration and residency could have changed from the time the petition was signed until the second review.

Appellants contend that Summe violated Section 2 by adding a "matching address" requirement to the statute and by adjudicating pink entries as being individuals who are not registered to vote in Kenton County. Summe argues that she properly undertook the task of verifying the validity of the signatures and used the address provided compared to the registered voter address to so verify.

Sub judice, Summe was presented a petition containing 24,301 signatures. KRS 147.620(4) requires that these signatures be dated and that the

[7] Other signatures were highlighted various colors depending on the deficiency found. For example, KRS 147.620 requires that the signature be dated. Signatures with missing dates were excluded. Highlighted orange were 935 entries because the signer was not registered to vote; the signer appeared in the database but declined to be a registered voter. Highlighted yellow were 96 entries due to missing signatures. Highlighted green were 4,292 entries because the signers were not found in the system, signers lived in the wrong county, had incomplete addresses, or multiple versions of the name appeared in the database yet none of the addresses matched. Highlighted blue were 1,519 entries due to illegible names at both the printed and signature lines. Highlighted purple were 166 entries due to signers using initials instead of legal names. We note that if the pink entries are not excluded, but the remaining highlighted ones are, the petition would contain 17,293 signatures, which is slightly less than the threshold of 17,491 required signatures. Appellants primarily focus their arguments on the exclusion of the pink entries, as do we.

signers be registered voters living in the planning area commission's territory. It is unreasonable for the clerk to have first-hand knowledge of the registered voters given the size of the petition;[8] thus, we believe that Summe properly undertook more than a facial review of the petition, i.e., she delved into whether the signer was a registered Kenton County voter and not simply that the petition was signed and dated.[9] This situation is similar to that in *Combs v. Dixon*, 215 Ky. 566, 286 S.W. 797, 799 (1926):

> In this *Blackburn* Case, a municipal office of the city of Stanton, the county seat of Powell County, was involved. The town was a sixth class city, and so necessarily small in extent. The heading of the nominating petition recited that its subscribers were citizens of that town. Only 20 were needed. Under such circumstances, it was not an unwarranted presumption to say that the county clerk, whose office was located in that town, would be presumed to know whether or not the signers of the petition were residents of that city. Moreover, the demurrer to the answer admitted that very fact. But, in

[8] Our courts have discussed a facial review of a petition:

> KRS 67.030 does not prescribe any method or procedure for determining whether the signers of a petition filed thereunder do in fact constitute a majority of the voters living in the territory sought to be transferred. In such a case the county judge must proceed ex parte to determine the sufficiency of the petition on its face and, if he deems it necessary, satisfy himself that the signatures and petitioners are what and who they purport to be and constitute the required percentage of voters. *Skaggs v. Fyffe*, 266 Ky. 337, 98 S.W.2d 884, 889 (1936); *Stieritz v. Kaufma*n, 314 Ky. 10, 234 S.W.2d 145 (1950). If he is in error in declining to direct the election, this court has jurisdiction under Const. § 110 to correct his action. *Franklin v. Pursiful*, 295 Ky. 222, 173 S.W.2d 131, 133 (1943); *Bays v. Bradley Mills*, Ky., 254 S.W.2d 348 (1943).

Coffey v. Anderson, 371 S.W.2d 624, 625 (Ky. 1963).

[9] There are allegations of fraud in the petition. Two affidavits were submitted of physicians stating that their purported signatures on the petition were forged. Additionally, U.S. Bankruptcy Trustee Lori Schlarman testified that she did not sign the petition and did not live in Kenton County despite her name appearing on the petition with a Kenton County address.

> the case before us, the office involved is a county office. Leslie County is a large one. The heading of the nominating petition did not recite that the subscribers were citizens or residents of Leslie County, but only that they were "legal voters" therein, a palpable conclusion on their part. There is no averment that the county clerk had any information concerning the residence or post office address of any of the signers other than that furnished him by the nominating petition itself. The answer specifically put in issue the qualification of the signers of appellant's petition, and appellant took no proof to show that those signers, whose names had no post office or residence address appended to them, were residents of Leslie County or qualified to vote for appellant, or that the county clerk who received the nominating petition knew any of these facts.

Combs v. Dixon, 215 Ky. 566, 286 S.W. 797, 799 (1926).

Unlike *Combs* the petition *sub judice* contained this heading per KRS 147.620(4)(b): "The undersigned registered voters as determined by subsection (4)(a) of this section, living within the area planning commission territory (and containing a description of the territory) hereby request that the question of the dissolution of the commission be put to a referendum." While this lends credence to the validity of the signatures, we agree with the trial court below that Summe had a duty to examine the validity of the signatures, especially in light of the sheer number of signatures. *See Howell v. Wilson*, 371 S.W.2d 627, 629-30 (Ky.

1963).[10] We do not believe that Summe's comparison of the petition address to the voter registration database address was unreasonable.

Nevertheless, we believe that any signature of a registered voter which showed a different address than that of the voter registry, yet still showed an address in the area planning commission territory, was improperly excluded based on the requirements of KRS 147.620(4)(b). Having concluded otherwise, the trial court erred in granting summary judgment on this ground. Ultimately, our finding of error does not necessitate a reversal as the grant of summary judgment was also premised on the clerk determining that the petition failed to include the required number of valid signatures based on the dates subscribed by the signers thereto.

Summe also rejected the petition based on the dates listed with the signatures. The trial court was presented an affidavit from the attorney who created the petition, Richard Brueggemann, which stated that the petition was not created until May 10, 2011. The problem presented by the petition was that the earliest date found within the 24,301 signatures was February 5, 2011. Appellants contend that anything dated before May 10, 2011, was clearly in error and Summe acted arbitrarily in excluding the entire petition based on a few incorrect dates.[11]

[10] Respondent, however, had the duty to examine the petitions before calling or refusing to call the election. As stated in 18 Am.Jur., *Elections*, sec. 102, p. 244: 'There is no presumption that the signers of a petition are qualified electors, and in the absence of any provision of law to the contrary, the duty of determining whether a petition presented is in accordance with the requirements of law falls upon the officers to whom it is presented and who are to call the election.'
Howell at 629-630.

[11] Strangely, the only purported incorrect dates are from the three months proceeding May and not from a wider variety of months as one might expect with incorrect dates and 24,301 signatures.

Appellants point out that the alleged mistaken dates are on pages between signatures with dates after May 10, 2011. The petition contained dates of signatures prior to May 10, 2011, from February, March, and April, specifically, three on February 5, 2011, four on February 6, 2011, two on February 21, 2011, one on February 24, 2011, two on March 27, 2011, one on April 4, 2011, one on April 5, 2011, one on April 6, 2011, one on April 18, 2011, two on May 5, 2011, and two on May 6, 2011.[12]

Upon our review of KRS 147.620 and the record, we agree with the trial court that the provisions of KRS 147.620 are clear, plain, and unambiguous, requiring that persons signing the petition must be registered voters living in the areas of the planning commission territory and that the signatures shall be dated, the last no later than 90 days after the first.

Appellants argue that the 90-day requirement is subject to four interpretations and accordingly is ambiguous. We disagree. The law in this Commonwealth is clear with respect to the manner in which statutes are to be construed. As we have previously held, in construing a statute, the courts are guided by the two paramount rules of statutory construction, that is, that words must be afforded their plain, commonly accepted meanings and that statutes must be construed in such a way as to carry out the intent of the legislature. *See McLain*

[12] While Summe discussed people signing their birthdays as opposed to the date, there is no argument that these alleged incorrect dates correlate to the signer's birthday. Summe argues, without support to the record, that other ballot initiative proponents collected signatures besides the Northern Kentucky Tea Party. The Northern Kentucky Tea Party hired Bruggemann to prepare the ballot. Strangely, Summe offers no hypothesis as to how this would match the same petition created by Bruggemann.

v. Dana Corp., 16 S.W.3d 320, 326 (Ky. App. 1999). Indeed, the courts of this Commonwealth are not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used. *See Posey v. Powell,* 965 S.W.2d at 836, 838 (Ky. App. 1998).

First, Appellants argue that the 90-day requirement could be strictly construed to mean the earliest signature from a chronological perspective. We believe that this is the proper and logical interpretation of the statute. The legislature clearly set forth that the signatures were to be dated, the last no later than 90 days after the first. Thus, the last signature must be within 90 days of the first, necessitating a chronological review. The remaining interpretations purposed by the Appellants appear to be attempts to show an ambiguity where there is not one contained in the statute.[13] We find such arguments to be without merit. The legislature was very clear in its requirements.

We likewise agree with the trial court that the 90-day window imposed by statute is a requirement that the petition must meet in order to be certified. We find no constitutional violation to Summe's decision and the interpretation that the petition must conform to the statutory requirements. Given[14]

[13] Moreover, "first" could be interpreted to mean the very first signature on page 1, line 1 of the petition, which would be June 16, 2011, as Summe directed the petition be paginated. "First" could also refer to the earliest date set forth by a qualified voter, and at least one of the signatures dated February 5, 2011, was disqualified. Last, "first" could mean the first date and signature which would give the requisite number of signatures necessary for approval in the 90-day window.

[14] If the entire petition had been contained in the appellate record, a more meaningful review of the petition would have been possible. It is the duty of an Appellant to ensure that the record on appeal is "sufficient to enable the court to pass on the alleged errors." *Burberry v. Bridges*, 427 S.W.2d 583, 585 (Ky. 1968). "It has long been held that, when the complete record is not before

that only a small number of the signatures are dated within 90 days of the first, the trial court correctly granted Summe and the Kenton County Fiscal Court summary judgment.

Last, the parties disagree as to whether the court erred in holding discovery in abeyance. On November 3, 2011, the Appellants served the Appellees with interrogatories and requests for production of documents and requests for admissions. On November 8, 2011, Appellees moved the trial court to hold discovery in abeyance until summary judgment motions were briefed as the pending action dealt primarily with issues of law and Appellees sought to avoid unnecessary costs. The court ordered discovery stayed until the summary judgment matter was briefed. Appellants then moved the Court to lift the stay on discovery, which the court denied. Appellants claim that discovery was necessary to determine perceived conflicts of interest between the clerk, the Kenton County Attorney, and the representatives from the NKAPC.[15] Appellees argue that discovery was unnecessary as there was no factual dispute in the summary judgment motion.

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the appellate court, that court must assume that the omitted record supports the decision of the trial court." *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). We must assume that the date of the very first signature and the very last signature was more than 90 days as found by the clerk and the court. Therefore, the petition failed to meet the statutory requirements. To count signatures by shifting the 90-day period through the petition to try and get sufficient signatures within a 90-day period violates the statute's 90-day requirement.

[15] The perceived conflict of interest involves Summe's former employer, Garry Edmondson, who advised the Kenton County Clerk in his capacity as the Kenton County Attorney and represents the NKAPC as a private lawyer. Appellants wish to delve into Summe's reasons for her statutory construction. Moreover, the NKAPC moved to intervene, which the trial court has not ruled upon. At the hearing, Edmonson entered his appearance for the NKAPC. Counsel then can be seen actively assisting Summe's counsel at the hearing.

Control of discovery is a matter of judicial discretion. *Primm v. Isaac*, 127 S.W.3d 630, 634 (Ky. 2004). We review such decisions for abuse of discretion. *Naive v. Jones*, 353 S.W.2d 365, 367 (Ky. 1961)(appellate court should respect the trial court's exercise of sound judicial discretion in the enforcement of the civil rules pertaining to discovery). Abuse of discretion occurs when a decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008) (internal citations omitted).

Appellants direct this Court to *Volvo Car Corp. v. Hopkins*, 860 S.W.2d 777, 778-79 (Ky. 1993), wherein the Kentucky Supreme Court discussed the entry of a blanket protective order denying discovery by the trial court:

> The only limits in the Civil Rules on discovery of matters not privileged is whether "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." CR 26.02(1). "It is not ground for objection that the information sought will be inadmissible at the trial." *Id.*
>
> Indeed, Rule 26.02(1) specifically provides that one of the matters discoverable is "the identity and location of persons having knowledge of any discoverable matter." The obvious reason for undertaking such discovery is to interview such persons to develop one's case. The trial court's order prohibits precisely what the rule contemplates.
>
> A review of the orders, opinions and comments as transcribed in the record reveals that the trial court's concerns with the process of voluntary interviews were that it might stir up litigation against Volvo from other dissatisfied complainants or might require Volvo to engage in unnecessary pretrial expenses to discover what the petitioners may have discovered in their investigation. These concerns are speculative at best,

> and, in any event, they fail to provide any valid legal reason to deny discovery otherwise permitted by CR 26.02. As stated in *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), a protective order against discovery is appropriate only upon proof that it is "being conducted in bad faith or in such manner to annoy, embarrass, or oppress the person subject to the inquiry."

Id.

We agree with Appellants that the trial court erred in holding discovery in abeyance. Ultimately this error is harmless as additional discovery would not have changed the dates on the petition which fell outside the statutory ninety-day requirement. *See McFall v. Peace, Inc*., 15 S.W.3d 724, 726 (Ky. 2000) ("Erroneous rulings on discovery matters are subject to the harmless error rule of CR 61.01."). Accordingly, we decline to find reversible error on this ground.

In light of the aforementioned, we affirm.

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