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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001199-MR

ROBERT PRUITT and DEAN SPOONER — APPELLANTS

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN L. WILSON, JUDGE
ACTION NO. 15-CI-00732

HENDERSON COUNTY BOARD OF EDUCATION — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON, & THOMPSON, JUDGES.

CLAYTON, JUDGE: Robert Pruitt and Dean Spooner, *pro se*, appeal a grant of summary judgment entered in the Henderson County School Board's[1] favor. Pruitt and Spooner claim that a public question regarding a recallable tax was improperly worded. Specifically, they claim HCSB's submitted public question regarding its

[1] Appellee's legal descriptor is incorrect, *see* Kentucky Revised Statutes (KRS) 160.160(1). For purposes of this appeal we will refer to Appellee as Henderson County School Board (HCSB).

decision to impose a "nickel tax" was misleading to real property owners in Henderson County because it purported to impose a fixed tax instead of a variable tax. They also argue that if the ballot were properly worded, HCSB should not have been permitted to collect taxes based on assessments that occurred prior to the election.

Pruitt and Spooner also, for the first time, claim the trial court judge should have been disqualified due to an alleged conflict of interest. As proof of their disqualification claim, they attach numerous documents to their brief – documents that are not included in the certified record. HCSB responds to Pruitt and Spooner's legal claims regarding the nickel tax, and they also have filed a motion to strike portions of Pruitt and Spooner's brief concerning the disqualification issue.

Regarding the wording of the public question on the ballot, we hold that summary judgment was properly granted because the petition was untimely filed. Regarding the collection of taxes, we find no error as the applicable statutes permitted HCSB to issue a second set of tax bills after the recall election.

Regarding the disqualification issue, we hold that it is not properly before us.[2] Pruitt and Spooner did not object to the trial court judge's

[2] Furthermore, even if we were to consider the disqualification issue, any error would be harmless. The only substantive order for our appellate review is an order involving summary judgment, which we ultimately hold was properly granted. As we review such orders *de novo* "in the sense that we owe no deference to the conclusions of the trial court[,]" *Pinkston v. Audubon Area Community Services, Inc*., 210 S.W.3d 188, 189 (Ky. App. 2006) (citing *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000)), and we can perceive no risk of injustice or undermining of the public's confidence in the judicial process even if the trial court judge should have been disqualified, then any disqualification error would have been harmless. *See Shell Oil Co. v. U.S.*, 672 F.3d 1283 (Fed. Cir. 2012).

qualifications during the lower court proceedings, nor did they file a CR 59.05 or 60.02 motion once they learned of the information. Thus, "the objection made for the first time on this appeal was made too late." *Nugent v. Nugent's Adm'r*, 293 S.W.2d 478, 479 (Ky. 1956); *Petzold v. Kessler Homes, Inc.*, 303 S.W.3d 467 (Ky. 2010) (issue properly raised when, during pendency of appeal, party discovered potentially disqualifying information and filed a CR 60.02 motion in trial court asking trial court judge to recuse). *See also Belden v. Cabinet for Families and Children*, 488 S.W.3d 45, 52 (Ky. App. 2016). As the disqualification issue is not preserved, and we are not reviewing the issue or the improper attachments, HCSB's motion to strike the brief and the exhibits not contained in the record is denied as moot.[3]

We now turn to the substantive issue before us: did the trial court err by sustaining HCSB's motion for summary judgment? Principally, Pruitt and Spooner claim the ballot question submitted by HCSB was misleading because it stated the tax rate would be five cents on each one hundred dollars, when the tax rate is really an equivalent, variable rate that may exceed five cents on each one hundred dollars. Our review of the trial court's order is *de novo*. *Pinkston v.*

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[3] The motion to strike also claims that Pruitt and Spooner's brief inadequately presents preservation statements, fails to make complete legal arguments, and does not provide ample cites to the record and law. Being *pro se* appellants, Pruitt and Spooner are receiving some leniency and not being held to the same standards as those who proceed with legal counsel. *Cf. Commonwealth v. Miller*, 416 S.W.2d 358, 360 (Ky. 1967); *Case v. Commonwealth*, 467 S.W.2d 367, 368 (Ky. 1971). Our review of both parties' briefs leads us to the conclusion that the issues were properly presented by Pruitt and Spooner and ably defended by HCSB's counsel. There is no reason to impose sanctions in this case, so we deny, *in toto*, HCSB's motion to strike.

Audubon Area Community Services, Inc., 210 S.W.3d 188, 189 (Ky. App. 2006). To review the claim, we begin with the relevant, undisputed facts.

On April 20, 2015, HCSB voted and approved levying a recallable nickel tax on top of the regular real and personal property tax already in place. This tax was to generate revenue for renovating and constructing school facilities. Though colloquially referred to as a "nickel tax," both parties agree that the actual tax imposed was higher. HCSB explains that because it only levies the tax on real property, not on personal property, and because not everyone pays their real property taxes, the actual tax imposed must be higher so the full assessment is collected. This higher rate is an equivalent tax rate. In the instant case, the parties agree that the equivalent rate imposed on real property was 5.9 cents. In fact, three days after HCSB voted on the recallable tax, it published a notice in the local newspaper that a recallable tax of six cents had been adopted. *See, generally*, KRS 160.470.

Because HCSB voted to impose the recallable tax, qualified voters who resided in the area commenced petition proceedings to protest the tax. KRS 132.017. HCSB then submitted to the county clerk a "question as to whether the property tax rate shall be levied." KRS 132.017(3)(a). The following was submitted and placed on the November 3, 2015 ballot:

> Are you for or against the Henderson County Board of Education raising funds to be used to renovate and construct school facilities by levying a real estate and personal property

tax of five cents ($0.05) on each one hundred dollars ($100) valuation?

Henderson County citizens voted 4,956 for and 4,799 against. Thus, the recall election effort failed. In December of 2015, HCSB mailed out bills for the 2015-2016 school year that included the 5.9 cent recallable tax.

On December 22, 2015, more than 30 days after the election, Pruitt and Spooner filed their complaint and raised two principal allegations: (1) HCSB levied taxes in excess of the five cents per $100 stated in the ballot language; and (2) HCSB levied taxes for a time period before the election affirmed the nickel tax. The trial court rejected both claims and granted summary judgment in HCSB's favor. We now address these claims *de novo*.

Under the first allegation of error, Pruitt and Spooner are challenging the wording of the public question that was placed on the ballot. This allegation is untimely and was properly dismissed. "[E]lection challenges based on the wording of a public question constitute election contests governed by KRS 120.250, which requires that such contests be brought within thirty days after the election." *King v. Campbell County*, 217 S.W.3d 862, 866 (Ky. App. 2006) (citing *Forrester v. Terry*, 357 S.W.2d 308 (Ky.1962), and *Chandler v. City of Winchester*, 973 S.W.2d 78 (Ky. App. 1998)). Notably, Pruitt and Spooner do not claim any error with the jurisdictional prerequisites or statutory requirements for placing the public question on the ballot, challenges that would render the election void, and thus would have been timely made more than 30 days after the election. *Robinson v.*

Ehrler, 691 S.W.2d 200, 204 (Ky. 1985). Instead, they claim a latent defect – the equivalent tax that was subject to recall did not comport with the wording of the public question – which, if true, could render the election result voidable. *Id*. As Pruitt and Spooner did not file their complaint within 30 days of the election, their claim is untimely, and summary judgment was properly granted.

Alternatively, we hold that there was no latent defect with the public question on the recall ballot. Pursuant to the statute, the question to be placed on a recallable-tax ballot is "whether the property tax rate shall be levied." KRS 132.017(3)(b). When interpreting this statute, we must allow the plain meaning of the statutory language to control unless an injustice or ridiculous result would occur. *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005) (footnotes and citations omitted). Here, HCSB submitted a public question that included the property tax rate to be levied – five cents per one hundred dollars. The plain language of the statute only requires the property tax rate be included in the public question. It does not require the equivalent tax rate to be placed on the ballot. Indeed, it would be difficult to do so, as it appears the equivalent tax rate changes from year-to-year. Thus, even if the complaint were timely filed, we would not hold that there is a latent defect with the question as the statute's plain language only requires the property tax rate to be included. Summary judgment was properly granted to HCSB, and we AFFIRM the trial court's order on this issue.

Concerning the second allegation of error, Pruitt and Spooner claim HCSB should be prohibited from collecting tax assessments that predate the recall election.[4] The express statutory language governing recall petitions states:

> (4) Notwithstanding any statutory provision to the contrary, if a local governmental entity or district board of education has not established a final tax rate as of September 15, due to the recall provisions of this section . . . regular tax bills shall be prepared as required in KRS 133.220 for all districts having a tax rate established by that date; and a second set of bills shall be prepared and collected in the regular manner, according to the provisions of KRS Chapter 132, upon establishment of final tax rates by the remaining districts.
>
> (5) If a second billing is necessary, the collection period shall be extended to conform with the second billing date.

KRS 132.017(4)-(5).

Thus, if a recall election is unsuccessful, a school board is permitted to mail out a second set of tax bills after the recall election "upon establishment of final tax rates[,]" which now includes the recallable nickel tax. When interpreting statutory language, "our duty is to ascertain and give effect to the intent of the General Assembly. We are not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used." *Beckham v. Board of Educ. of Jefferson County*, 873 S.W.2d 575, 577 (Ky. 1994) (citing *Gateway Construction Co. v. Wallbaum*, 356 S.W.2d 247 (Ky.

[4] In their brief, Pruitt and Spooner do not specifically lay out their argument on this issue. However, in an abundance of caution we will address it here because: (1) Pruitt and Spooner are proceeding *pro se*; (2) the issue comports with Pruitt and Spooner's requested relief; (3) we are conducting a *de novo* review of the trial court's order; and (4) the argument is readily ascertainable in the record before us.

1962)). Here, it is apparent that the second tax bill relates back to the first billing. In other words, the second tax bill is for the collection of the recallable tax that was not included in the original tax bill. That second tax bill, then, must concern taxes for the same fiscal year as the first tax bill. The statute speaks to no new assessment nor a new fiscal year. Accordingly, we find no impermissible retroactive application where HCSB has mailed a second tax bill in conformity with KRS 132.017(4)-(5). We AFFIRM the trial court's order on this issue as well.

CONCLUSION

After reviewing *de novo* the trial court's order granting HCSB's motion for summary judgment, we hold that summary judgment was properly granted, thus we AFFIRM the order. By separate order, we DENY AS MOOT HCSB's motion to strike Pruitt and Spooner's appellate brief inasmuch as it relates to the disqualification issue because we decline to address the issue for lack of preservation. We also deny as moot HCSB's motion to strike Pruitt and Spooner's appellate brief for failure to comply with appellate briefing requirements.

ALL CONCUR.

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