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IN THE SUPREME COURT OF OHIO

IN RE: CONTEST OF ELECTION HELD ON STARK COUNTY ISSUE 6 (LAKE TOWNSHIP POLICE DISTRICT) IN THE GENERAL ELECTION HELD NOVEMBER 8, 2011

CASE NOS. 2012-0184
2012-0214

BOARD OF TRUSTEES OF LAKE TOWNSHIP, STARK COUNTY, OHIO,

Appellant and Cross-Appellee,

v.

PETITIONERS IN THE CONTEST OF THE ELECTION HELD ON STARK COUNTY ISSUE 6 (LAKE TOWNSHIP POLICE DISTRICT) IN THE GENERAL ELECTION HELD NOVEMBER 8, 2011,

Appellees and Cross-Appellants,

On Appeal from the Court of Common Pleas, Stark County, Ohio Case No. 2011CV03947

Appeal of Right from Final Decision in an Election Contest pursuant to R. C. 3515.15 (S.Ct.Prac.R.2.1(C)(2))

RESPONSE BRIEF OF APPELLANT AND CROSS-APPELLEE BOARD OF TRUSTEES OF LAKE TOWNSHIP, STARK COUNTY, OHIO

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STATEMENT OF THE FACTS

Appellant/Cross-Appellee Lake Township (hereinafter "Appellant") incorporates as if fully rewritten herein its Statement of Facts contained in its Merit Brief on March 19, 2012, and adds the following:

R.C. 3515.09 requires that the contest of an election be signed by at least twenty-five voters who voted in the election in which Issue 6 appeared. The petition must be verified by at least two of the petitioners. This election contact petition was signed by 290 electors and verified by five electors (see Election Petition). The five "verifiers" are the witnesses the trial court called to testify on January 6, 2012 (Jan. 6, 2012 Tr. p. 20, l. 20-25; p. 21. l. 1-2).

The sufficiency of the notice published in the Hartville News, pursuant to R.C. 5705.25, was never cited by Appellees/Cross-Appellants (hereinafter "Appellees") as an irregularity. Appellees/Cross-Appellants stipulated that the only irregularity was the erroneous calculation of 4.5 mills per one dollar of valuation amounting to $0.45 per one thousand dollars of valuation (the correct expression is $4.50 per one thousand dollars of valuation). In all other ways there was compliance with the statute. (Jan. 6, 2012 Tr. p. 25, l. 5-22).

ARGUMENT

A. Appellee/Cross-Appellants' Proposition of Law Raised in Merit Brief

R.C. 3515.11 permits the amendment of an election contest petition pursuant to evidence disclosed through the discovery process.

R.C. §3515.11 does give a court, in an election contest, the discretion to permit amendments to the petition. Appellees have the burden of demonstrating to this Court that, based on the evidence before it, the trial court abused its discretion when it did not permit such

an amendment. Appellees base their proposition of law on the handwritten note from Secretary of State legal counsel, Gretchen Quinn, to Stark County Board of Elections employee, Kathy Lewis: "A 4.5 mill levy yields $0.45 per $100, but a $4.50 per $1,000. Board of Elections may want to confirm millage with taxing authority." (Supp. p. 23).

As stated in Appellant Lake's merit brief, the ballot language contained in its June 27, 2011 resolution stated "...at a rate not exceeding four and one-half (4.50) mills per dollar of taxable valuation, which amounts to forty-five cents per one thousand dollars in valuation..." (Supp. p. 16). The ballot prepared by the Board of Elections contained a correction to the arithmetic in that resolution, expressing the tax rate of 4.5 mills per dollar as forty-five cents per hundred dollars of valuation (Supp. p. 14).

When the Secretary of State received the resolution and Board of Elections ballot language on June 25, 2011, it noted the discrepancy between the two, and noted the arithmetic error in Appellant Lake Township's June 27, 2011 resolution, and she recommended that the Board of Elections confirm the millage with the taxing authority. (Supp. p. 13-14; 21-23). The ballot language subsequently approved by the Board of Elections and certified as Issue 6, reverted to the language contained in the June 27, 2011 resolution.

Inherent in an allegation of fraud or misrepresentation is the concept of intent. There is nothing in the memo from the Secretary of State, upon which Appellees based their motion to amend, and their proposition of law before this Court, that implies either fraud or misrepresentation. If anything, it implies possible error. As Appellant Lake discussed in its Merit Brief, the arithmetic error was plain in the June 27, 2011 Lake Township resolution; plain in the notice posted by the board of elections in the Hartville News and on its website; plain on

the face of the ballot, capable of discernment by anyone who bothered to notice.

The parties stipulated that the newspaper articles, Township newsletter, and mailings by the levy committee, all contained an accurate representation of the actual cost to an owner of a $100,000 home in Lake Township. (Supp. p. 47-84). If Appellant had intended to misrepresent the true cost of the levy to the voters, would they have gone to such lengths to inform the voters? Further, Appellant Lake proffered that it did not realize the mistake until mid-October when they were informed by a board of elections employee it was too late to do anything. If that employee was incorrect, her mistake does not rise to the level of fraud or misrepresentation, particularly because the board of elections was neutral regarding the passage of Issue 6.

"The Ohio Supreme Court has long held that the action of a public officer, or of a board, within the limits of the jurisdiction conferred upon it by law, is not only presumed to be valid but it is also presumed to be in good faith and in the exercise of sound judgment." *Williams v. Morgan County*, 2001 WL 1773873 (Ohio App. 5 Dist.), *Zalud v. Tracy*, 77 Ohio St.3d 74, 671 N.E.2d 32 (1996). The Lake Township Board of Trustees was conferred the authority, under R.C. §505.482, to adopt a resolution to propose expansion of its police district and provide a levy to pay therefor, to the electorate of Lake Township.

The Stark County Board of Elections (not the political subdivision) is charged with preparing ballot language, certifying issues for the ballot, and publishing same. R.C. §5705.25. All of those actions are presumed valid and in good faith.

As discussed in the Appellant's Merit Brief, there is no "clean hands doctrine" or "balancing of the equities" in an election contest. The burden of challenging an irregularity in a ballot before the election is on the contestors—those who are trying to effect a change in the

election result. Appellees' argument is an attempt to shift that burden. Given the entire record before the trial Court, not only was there no evidence to demonstrate fraud or misrepresentation by Appellants Lake or the board of elections, the memo from the Secretary of State of Ohio attorney would not lead to any evidence of fraud or misrepresentation.

Appellees' proposition of law here is a mere restatement of the statute. Leave to amend a petition in a election contest is a matter of the trial court's discretion and unless that discretion has been abused a denial of leave to amend will be upheld. *Harmon v. Baldwin*, 107 Ohio St.3d 232, 837 N.E.2d 1196 (2005).

The trial court did not abuse its discretion in denying Appellees' motion to amend their petition.

B. Appellees'/Cross Appellant's Propositions of Law Raised in Response Brief

In addition to the proposition of law raised by Appellees in their merit brief addressed above, they have also posed four propositions of law in their response brief which are addressed below.

Proposition of Law No. 1:

Failure to comply with mandatory procedures for tax levies is fatal to the election results.

Appellees rely on *Beck v. City of Cincinnati,* 162 Ohio St. 473, 124 N.E.2d 120 (1955), *Mehling v. Moorehead,* 133 Ohio St. 395, 14 N.E.2d 15 (1938) and *Alexander v. The City of Toledo,* 168 Ohio St. 495, 156 N.E.2d 315 (1959), to demonstrate that Appellant failed to comply with mandatory procedures for a tax levy. Yet they fail to identify any procedure which was not complied with. The board of trustees of Lake Township adopted a resolution of necessity for the

expansion of the police district and the extension of the tax levy. That resolution was certified to the county auditor for a certification of revenue based on millage. A resolution to proceed with placing the tax levy before the electors was adopted and filed with the board of elections, which in turn prepared the ballot and advertised the election according to R.C. § 5705.25. In fact, Appellees stipulated that all procedures for Issue 6 were in order with the sole exception of the number of dollars to be generated per one thousand dollars of valuation. Even the form of the ballot, excepting the number, was in compliance with the statute. (Jan. 6. 2012, Tr. p.25, ll. 5-22) Appellees' reliance on *Mehling* (holding that *procedures* are mandatory) is misplaced. There is no procedure applicable to Issue 6 which was not followed and Appellees can point to none.

<u>Proposition of Law 2</u>
Failure to comply with mandatory procedures for tax levies is fatal to the election results.

Appellant Lake reiterates its position as to the application of laches/ estoppel discussed in its Merit Brief, and briefly addresses a few points raised by Appellees.

In its Judgment Entry, the trial court stated "...none of the campaign materials ever expressed the amount of the ballot issue in dollars and cents per one thousand dollars in valuation as required by R.C. 505.481(B)." (Judgment Entry, p. 4). Nothing in the Ohio Revised Code prescribes that campaign materials must contain ballot language. Appellant brought the campaign materials to the trial court's attention, as well as the extensive newspaper coverage, to demonstrate that Issue 6 was well known and widely discussed in Lake Township, and that the

actual cost to a homeowner was in all of those sources. The point, like that in *State ex rel. Bd. of*

Educ. of Plain Local School District v. McGlynn, 100 Ohio App. 57, 135 N.E.2d 632 (1955) was that because of all the publicity and information available for months prior to the election, no voter was misled due to the arithmetic error.

A. No voter testified that he or she knew of the irregularity before the election.

Appellant is not attacking any of the five verifiers who testified on January 6, 2012. In its Statement of Facts, it accurately quotes from that transcript regarding Mr. Doty and Ms. Shaffer. If one is aware that "something is different" isn't one charged with a duty to further inquire? Appellant has submitted that this Court's directive has always been utmost diligence in an election contest. Appellant again stresses that of the 290 contestors, three of the five verifiers were put on notice that something was amiss with the ballot language before they voted.

Appellant was informed by a board of elections employee that there was an irregularity but it was also told it was too late to do anything about it. (Jan. 23, 2012 Tr. p. 18, l. 7-13). Further, Appellant Lake did not publish the notice; pursuant to R.C. 5705.25, the Board of Elections did so.

B. The circulation of the hartville news was insufficient to put voters on notice of the irregularity.

The sufficiency of the notice in the Hartville News was never raised by Appellees. R.C. 5705.25 requires a board of elections publish notice of an election in a newspaper of general circulation. R.C. 7.12 defines what a newspaper of general circulation is, and, as the Affidavit of the owner of the Hartville News and the Record 63-73 shows, the Hartville News is, as a matter of law, a newspaper of general circulation. Therefore, Appellees and all electors in Lake Township were put on notice regarding Issue 6.

C. The irregularity was not plain on its face so as to put voters on notice.

Appellant reiterates its argument in its Merit Brief. To highlight a point, contestors in an election contest were aware, or should have been aware, of a clear arithmetic error. The evidence before the Court that two of the five verifiers, and eleven of the twelve contestors who testified on January 23, 2012, did not notice the error, does not meet Appellees' burden to prove that laches does not apply in this case.

D. Pursuant to *Beck*, laches has no application in this election contest.

Beck v. City of Cincinnati, 162 Ohio St. 473, 124 N.E.2d 120 (1955) arose as a contest over the results of an election on a 6.22 mill current expense levy for the city of Cincinnati. Inserted in the ballot language were the words, 'If the levy passes, there will be no city income tax in 1955 or 1956.' Counsel on both sides agreed that there was no provision, either in statutory law or the Cincinnati charter, authorizing the insertion of that language.

The Supreme Court adopted the reasoning of the trial court, that:

> The form circumscribed by law is imperative and mandatory and is clearly calculated and intended for the protection of the citizen in exercising his voting franchise. *To enlarge upon the limitations imposed by law* would tend to injuriously affect his rights. If argumentation, promises, misrepresentations or coercive statements should be permitted on the face of the ballot, one could not predict the limits of such practice and the confusion which may ensue. *Certainly if the proponent of such issue be permitted to introduce such material, the opponent should have the same privilege.*
>
> 'The inclusion of the so-styled parenthetical phrase, 'If tax levy is passed, there will be no city income tax in 1955 or 1956,' well intended as it may have been, is beyond the authority of city council to make. One of the sovereign powers of the city council is

> to levy taxes for the purpose of raising the necessary funds to operate the city government. *The council, by making the promise not to levy an income tax in 1955 or 1956, was acting beyond the scope of its authority. Such promise is not binding upon the city for, as a matter of law and should the necessity arise, council could lawfully pass an income tax, notwithstanding the promise contained in this ballot.* (Id., *Beck*. Emphasis added.)

No unauthorized language was inserted in the ballot for Issue 6. Neither promises, nor argumentation, nor coercion can be adduced from a clear reading of the ballot language. Appellees' effort to apply the *Beck* holding to the instant case is a clear example of a category error—the failure to compare apples to apples.

The form of the ballot used for Issue 6 is prescribed by law. R.C. § 505.481(B), effective November 5, 2004, which expressly provides for the expansion of a police district to cover all of the unincorporated territory of a township, states:

> (B) The election on the measure shall be held, canvassed, and certified in the manner provided for the submission of tax levies under section 5705.25 of the Revised Code, except that the question appearing on the ballot shall read substantially as follows:
>
> "Shall the unincorporated territory within ..... (name of the township) not already included within the ..... (name of township police district) be added to the township police district to create the ..... (name of new township police district) township police district?"
>
> The name of the proposed township police district shall be separate and distinct from the name of the existing township police district.
>
> If a tax is imposed in the existing township police district, the question shall be modified by adding, at the end of the question, the following: ", and shall a property tax be levied in the new township police district, replacing the tax in the existing township police district, at a rate not exceeding ..... mills per dollar of taxable valuation, which amounts to ..... (rate expressed in dollars and cents per one thousand dollars in taxable valuation), for

> ..... (number of years the tax will be levied, or "a continuing period of time")."

The ballot language for Issue 6 is exactly the language prescribed by the statute. There is no language in the ballot for Issue 6 which is not authorized by the Revised Code and (acknowledging, for the sake of discussion, the miscalculation asserted in the petition) Appellees cannot point to any. No promise, argument, or coercion is present here; only the ballot language authorized by law.

The irregularity alleged in the petition is not the issue addressed by the *Beck* decision. This case involves a miscalculation in the expression of "dollars and cents per one thousand dollars in taxable valuation." Cincinnati's ballot included material that was not authorized by statute or charter; Lake Township's ballot complies with the statute in every respect. The *Beck* decision invalidates only those ballots which contain unauthorized insertions which constitute argumentation, promises, misrepresentations or coercive statements. None of those practices are present here.

Insofar as counsel for Appellees rely on the dicta in *Beck* that states the Court "will not indulge such liberality of construction of ballots containing unauthorized statements or misrepresentations where bond issues and tax levies are the subject of the ballot," other tax levy election cases considering issues similar to Issue 6 come to a different conclusion. *In State ex rel. Bd. of Edn. Of Plain Local School District v. McGlynn,* 100 Ohio App. 57, 135 N.E.2d 632 (1955), the board of education had properly instituted all proceedings for a bond issue for construction and improvement of school buildings. However, the notice of election and the

ballot language, through error or inadvertence, expressed the amount of the average annual levy expressed in cents for each one hundred dollars of valuation as being 3.2 cents instead of 32 cents, and omitted the expression in mills for each one dollar of valuation (it was 3.2 mills). The election was upheld. The Court cited the many newspaper articles correctly stating the issue as 3.2 mills, and the amount of money, $1,670,000, that millage would raise. The Court used the substantial compliance standard and opined that it was apparent the voters knew of the issue and the irregularities did not prejudice or harm anyone.

That standard has been applied numerous times. "Where there is an absence of fraud, a substantial compliance with the statute, and no misleading of the voters, the will of the electorate should not be set aside..." *Mehling v. Moorehead*, 133 Ohio St. 395, 14 N.E.2d 15 (1938). The *Plain Local* case cited another bond levy case, *Conley v. City of New Boston*, 11 Ohio Supp. 91, 1942 WL 6588, (Ohio Com. Pl. Nov. 28, 1942). In that case, the published notice and ballots correctly stated the estimate of the tax necessary to pay such bonds in mills on each one dollar, but incorrectly stated the amount of such tax in cents on each one hundred dollars of valuation. In upholding the election results, the court stated, "...it can hardly be contended that the electors were deceived or misled...The published notice, as well as the ballot, carried the correct estimate of the tax levy on one dollar. We must presume the electors of the City of New Boston are intelligent and able to discern and valuate a clerical error involving a simple multiplication appearing so clearly as did the error complained of in this case."

Proposition of Law No. 3:
The trial court applied the correct legal standard when it determined that the result of the election was uncertain due to the irregularity contained in the ballot language.

A. Contestors proved by clear and convincing evidence that the irregularity made the election results uncertain.

Here Appellees undertake a tremendous effort to conflate the testimony of eleven witnesses and ten affiants into evidence that the result of the election result for Issue 6 was uncertain. Contrary to Appellees' assertion, Appellant has not ignored the standard for an election contest that the contestors must show by clear and convincing evidence that an irregularity occurred and that the irregularity affected enough votes to change or make uncertain the result of the election. At the end of the day (January 23, 2012, to be precise), simple arithmetic yields a result, if all the testimony, admissible or not, is weighed in favor of the Appellees, that Issue 6 still passed; not by a vote of 5577 to 5087, but by 5556 to 5108, a margin of passage of 448 votes. That margin is not indicative of any change or uncertainty in the result of the election for Issue 6.

Appellees assert that there is "no doubt that the trial court applied the correct standard." Appellants agree that the trial court used the right words; but when the only evidence of change in the outcome or uncertainty of the result of the election for Issue 6 consists of eleven witnesses and ten affiants who said they changed their minds, and the arithmetic is insufficient to overcome the margin of passage, even when multiplied by a factor of ten, there is nothing clear and convincing about it.

The only way Appellees are able to surmount their clear and convincing burden is by submitting, as they did, their evidence as a statistical sample. Appellant objected to the admission of the ten affidavits of those contestors who changed their minds. The only admissible evidence was adduced from the eleven witnesses who testified in open court. The statistical

sample was not created from a statistical model, or testified to by an expert in statistics, nor controlled so as to isolate all other reasons for which an elector might have buyer's remorse. It was simply offered (with the affidavits received over objection), without any testimony as to its validity, with a required multiplier in excess of ten, in order to show that the results of the election for Issue 6 were uncertain.

This Court has previously rejected such tactics. In the case of *State ex rel. Yiamouyiannis v. Taft*, 65 Ohio St.3d 205, 602 N.E.2d 644 (1992), this Court declined to certify a candidate to the presidential ballot where the candidate, claiming to be statistical expert, asserted he could show, on the basis of signatures checked on ten part-petitions, that fifty-one percent of them were valid. The court found the relator's evidence to be unreliable "because it does not account for the variety of reasons for which petition signatures may be properly disqualified under R.C. 3501.39(C)." *Id.* at 209. Appellees made no attempt whatever to validate their supposed statistical sample and the trial court should not have found such evidence to be clear and convincing of uncertainty.

B. The trial court acted within its discretion provided by R.C. 3515.11.

It is true that election contests are governed by R.C. § 3515.11, which states, in pertinent part, that "the proceedings at the trial of the contest shall be similar to those in judicial proceedings, insofar as practicable, and shall be under the control and direction of the court which shall hear and determine the matter without a jury, . . ." And Appellees correctly point out that the trial court has discretion to conduct the hearing of the election contest as other judicial proceedings would be conducted, insofar as practicable. So far, so good. Thereafter—in a leap

of logic worthy of a motorcycle launch over the Snake River—Appellees conclude, without the benefit of any authoritative support from any source, that the trial court in an election contest is simply not bound by the Rules of Evidence. Nothing could be further from the truth.

The election cases in which the rules of evidence have been applied are sufficient to wholly rebut Appellees' assertion. They offer no reasons, either here or below, why the Rules of Evidence should not apply. And they certainly would have objected to hearsay coming from the witness stand. Why the hearsay rule would not apply to the ten affidavits admitted over objection is unfathomable. This Court, in an election related case (*State, ex rel. Taft, v. Franklin Cty. Court of Common Pleas,* 63 Ohio St.3d 190, 586 N.E.2d 114 (1992)) held that the evidence rules applied to exhibits which were not properly authenticated, and granted a motion to strike them. In *State ex rel. Brenders v. Hall,* 71 Ohio St.3d 632, 646 N.E.2d 822 (1995), this Court noted that:

> Contrary to Brender's contention in his reply brief, evidence submitted under the Supreme Court Rules of Practice in an original action in this court should comport with the Rules of Evidence. *Id.* at Fn. 1.

The notion of Appellees that the Rules of Evidence just do not apply to election contests is made of whole cloth and where no exception is made, is totally foreign to adversary judicial proceedings in our courts.

Proposition of Law No. 4:
Voters must be able to trust in the integrity of the election process which requires that they trust in their government.

No one would dispute this proposition of law, but the way Appellees apply it to the situation herein is that if this Court allows the will of the electorate to stand, when it approved

Issue 6, it has started down a new path, and a "slippery slope" towards total disregard of election law. Appellees argue that public officials will be unbridled in their efforts to deceive and mislead the public, and the public will have no recourse. But the cases they rely on involved ballot language which was coercive, argumentative, and unauthorized. And there are no identified procedural errors in the submission of Issue 6 which Appellant failed to comply with.

This court's decision in *Beck* was announced to prevent perversity among public officials in election matters. That holding acknowledges that we live in a fallen world. Appellees' application of *Beck* demands that imperfect public officials achieve perfection in their calculation of the dollars to be stated on a ballot.

This case is not nearly so dramatic, or so unique as Appellees profess. In both the *Conley* and *Plain Local* cases cited, there was an error in the arithmetic expression of mills to dollars and cents.

This Court has recognized that humans are not perfect; mistakes will be made. And this Court has consistently held that after an election has been conducted, it will not overturn the result of that election, unless the requisite proof is present to demonstrate that the election result is rendered uncertain due to an irregularity. Appellant Lake's position in its Merit Brief, and this Response, is that the election on Issue 6 is not void on its face, and insufficient evidence was produced for the result to be overturned.

CONCLUSION

The trial court had discretion to deny Appellees' motion to amend its election contest petition and nothing has been produced or cited in the record to show that such a denial is an abuse of discretion. Appellees' proposition of law as posed in their merit brief, should be overruled.

Contrary to Appellees' argument, where election procedures have been complied with, an error in calculation of dollars per thousand dollars of valuation on a ballot is not so significant to mislead a majority of voters or render the outcome of an issue election uncertain, particularly where, as in the instant case, the error was plain on its face, and the contestors below knew or should have known through the exercise of extreme and utmost diligence of the irregularity complained of. Appellees here had many opportunities through examination of public documents, available to all the world, to discover and respond to the claimed irregularity. Even with the public documents and publication in a newspaper of general circulation, they sat on their rights before the election and did nothing.

The trial court, while using the right words to enunciate its decision, did not apply the correct standard of decision; the evidence of uncertainty is just not clear and convincing by the standard applied.

Finally, Appellees' slippery slope argument fails because it assumes the worst perversity in public officials, a fantasy, that is not supported by the facts and not tolerated without proof in Ohio law.

For all the foregoing reasons, this Court should reverse the trial court and uphold the results of the election of Issue 6.

Respectfully submitted,
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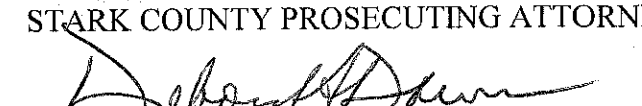
By: 

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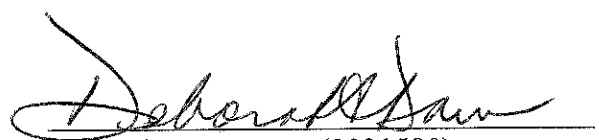

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