RENDERED: June 26, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 97-CA-0263-MR

CITY OF PRESTONSBURG APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 84-CI-0057

SHERRY RORRER, Executrix of
the Estate of Hazel Rorrer APPELLEE

OPINION
REVERSING AND REMANDING

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BEFORE: BUCKINGHAM, EMBERTON and GUIDUGLI, Judges.

BUCKINGHAM, JUDGE. The City of Prestonsburg (City) appeals from an order of the Floyd Circuit Court granting summary judgment nunc pro tunc in favor of Hazel Rorrer (Rorrer).[1] The City also appeals from the trial court's order denying its motion to vacate the summary judgment. For the reasons set forth hereinafter, we reverse and remand.

The relevant facts of the case are not in dispute. In March 1983, the City adopted an ordinance designed to annex certain

[1] Hazel Rorrer is now deceased, and this court has entered an order permitting Sherry Rorrer, executrix of Hazel Rorrer's estate, to be substituted as the appellee herein.

property, including a tract owned by Rorrer. A petition opposing annexation was timely filed, and the annexation issue was placed on the ballot at the general election in November 1983. See Kentucky Revised Statute (KRS) 81A.420(2). Eight votes were cast on the annexation issue--six votes against annexation and two votes in favor of annexation. No subsequent election contest was filed pursuant to KRS 120.250(1) by any party.

The Prestonsburg City Council voted unanimously in December 1983 to adopt the ordinance annexing the property in question. The minutes of the council's meeting explained that the City took such an action because it believed that "no qualified voters lived in the area to be annexed." KRS 81A.420(2)(c) provided at that time that "[i]f seventy-five percent or more of the qualified voters in the area to be annexed oppose annexation, the ordinance proposing annexation shall become ineffectual for any purpose."

Rorrer then filed suit in the circuit court in January 1984 seeking to have the annexation declared to be null and void. Both parties subsequently moved the court for summary judgment, but no order resolving those motions exists in the record. In July 1986, the case was dismissed under Civil Rule (CR) 77.02 for lack of prosecution.

The case lay dormant for almost ten years until the City moved the court to redocket the case in April 1996. The City's motion was denied by the trial court on the basis that the prior dismissal was without prejudice, meaning that the plaintiff,

Rorrer, had the right to refile the case but the defendant, the City, had no such right. Rorrer then moved the court to enter a judgment nunc pro tunc in accordance with a notation on the file jacket of the case made by the previous circuit judge in 1984.[2] After the parties submitted briefs on the issue, the trial court entered an order granting Rorrer summary judgment nunc pro tunc in accordance with the notation on the file jacket. That notation, as quoted in the order granting summary judgment nunc pro tunc, provides in its entirety as follows:

> The Defendant having admitted that seventy-five [percent](75%) of the votes cast voted against the proposed annexation and no protest or contest was filed within thirty (30) days after the election, Defendant as a matter of law is now estopped to contend the votes were illegal. Therefore, Summary Judgment for the Defendant.

The notation was apparently signed by the previous circuit judge and was dated August 10, 1984. Once the trial court denied the City's motion to vacate the summary judgment nunc pro tunc, the City filed this appeal.

The first question is whether the trial court had the authority to set aside the order of dismissal that was entered in 1986 and to redocket the case. As the record does not contain

[2] The record in this case is somewhat incomplete. We do not have Rorrer's motion for a judgment nunc pro tunc, nor do we have the notation made on the case jacket by the previous circuit judge. However, the City does not dispute that Rorrer made a motion for the entry of a judgment in accordance with the case jacket notation, nor does it dispute that a case jacket notation was made by the former circuit judge in accordance with the language quoted by the trial court in its order granting summary judgment nunc pro tunc.

Rorrer's motion, we are unaware of the procedural grounds upon which she relied. We presume that the trial court set aside the order dismissing the case based on its authority under CR 60.02(f) to relieve a party from an order for a "reason of an extraordinary nature justifying relief." The reason justifying relief was so that a judgment nunc pro tunc could be entered since the prior judge had apparently rendered a ruling which would constitute a final judgment in the case but had not reduced the ruling to a written judgment.

The City argues that the trial court's denial of its motion to redocket the case made the previous order of dismissal pursuant to CR 77.02 a final order and that Rorrer's failure to appeal the denial of the City's motion to redocket precluded the trial court's subsequent redocketing of the case. We disagree. When the trial court denied the City's motion to redocket the case, it simply held that Rorrer's complaint had been dismissed and that the City had no right to reinstate the action. This order did not, however, preclude Rorrer from reinstituting the action herself. We find no error or abuse of discretion in the trial court's granting Rorrer's motion to redocket the case, especially for the purpose of entering a judgment nunc pro tunc.

In Happy Coal Co. v. Brashear, 263 Ky. 257, 92 S.W.2d 23 (1935), it was stated:

> The rule in this commonwealth as to judgments seems now to be that a judgment may be entered nunc pro tunc if from some minute, memoranda, or paper in the record it can be shown the court had acted on the matter and just what the court's action was, so that

> nothing judicial remains to be done . . . .

Id. at 281. In Hazelip v. Doyel, 260 Ky. 313, 85 S.W.2d 685 (1935), it was held:;

> The general rule is that when an order or direction of the court has been omitted by inadvertence or mistake on the part of the clerk or the judge, and there is some memorandum, record, or writing in the cause indicating and establishing the character of judgment or order which the court actually rendered, and vested rights of innocent persons will not be injuriously affected, an order nunc pro tunc may be entered.

Id. at 314. Thus, as there was written documentation indicating the ruling of the trial court, although a formal order setting forth the ruling was apparently inadvertently not rendered, the entry of a judgment nunc pro tunc was proper.[3]

Finding no procedural deficiency in the trial court's entry of a judgment nunc pro tunc, the remaining issue concerns whether the judgment itself was proper. As we noted previously herein, the statute in existence at the time of the voting required that seventy-five percent of the qualified voters in the area to be annexed must have voted against annexation in order to render the ordinance ineffectual. While seventy-five percent of those voting opposed annexation, the City contends that seventy-five percent of the "qualified voters in the area to be annexed" must

[3] The current circuit judge stated in the order denying the City's motion to redocket that he was "well aware" of the prior judge's standard practice of making a notation of his ruling on the case jacket and then having one of the parties to prepare a judgment in accordance with those notes.

vote against annexation rather than seventy-five percent of those voting.

The relevant part of KRS 81A.420 that was in effect at that time did not define "qualified voter." The City contends that the definition found in Louisville Shopping Center, Inc. v. City of St. Matthews, Ky., 635 S.W.2d 307 (1982), should be controlling, while Rorrer argues that the definition of qualified voter in KRS 116.025(1) should be controlling. The Louisville Shopping Center case is directly on point and holds that "qualified voters" means those who are registered and eligible to vote and not just those who actually voted. Id. at 312. As there is absolutely nothing in the record to indicate the number of "qualified voters," there was a factual issue to be determined, and Rorrer was not entitled to judgment as a matter of law in this regard. Steelvest, Inc. v. Scansteel Service Ctr., Inc., Ky., 807 S.W.2d 476, 483 (1991).

The judgment also stated that since the City did not contest the vote within thirty days, then it was "estopped to contend the votes were illegal." KRS 120.250(1) sets forth a mandatory thirty-day window for an election on a public question to be contested. See also Dunn v. Marshall County Hosp. Dist., Ky., 543 S.W.2d 767, 769 (1976). Rorrer argues that the judgment was correct and that the City cannot now contest the election results. First, it is unclear how the City would have standing to contest the election under KRS 120.250(1) since that statute provides that an election on a public question may be contested

by "[a]ny elector who was qualified to and did vote on any public question . . . ." (Emphasis added.) We find that the City, as a governmental entity, would not constitute an elector as an elector is defined as a "duly qualified voter . . . ." Black's Law Dictionary 519 (6th ed. 1990). More importantly, the City is not contesting the election results but the effect of such results. The City merely contends that seventy-five percent of the "qualified voters in the area to be annexed" did not oppose annexation.

The bottom line is that the City passed the ordinance despite the vote on the annexation, and Rorrer challenged the City's actions by filing a suit in circuit court. It was then incumbent upon the court to determine whether the annexation ordinance had been rendered ineffectual pursuant to the statute based on the voting results. As the trial court failed to determine the number of "qualified voters in the area to be annexed," summary judgment was inappropriate.

The judgment nunc pro tunc of the Floyd Circuit Court is reversed, and the case is remanded for a disposition consistent with this opinion.

All CONCUR.

BRIEF FOR APPELLANT:

Paul B. Burchett
Prestonsburg, KY

BRIEF FOR APPELLEE:

James D. Adams II
Prestonsburg, KY