RENDERED: MAY 15, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001141-MR

CONCERNED CITIZENS FOR
HENRY COUNTY GOVERNMENT,
LLC; HUGH MCBURNEY; GEORGE
WEBSTER; AND SANDY ALLISON — APPELLANTS

APPEAL FROM HENRY CIRCUIT COURT
v. HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 04-CI-00287

HENRY COUNTY, KENTUCKY;
FISCAL COURT OF HENRY COUNTY,
KENTUCKY; JOHN LOGAN BRENT,
IN HIS OFFICIAL CAPACITY AS
COUNTY JUDGE/EXECUTIVE OF
HENRY COUNTY, KENTUCKY; AND
RUMPKE OF KENTUCKY, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND MOORE, JUDGES; KNOPF,[1] SENIOR JUDGE.

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

KNOPF, SENIOR JUDGE: Concerned Citizens for Henry County Government, LLC; Hugh McBurney; George Webster; and Sandy Allison appeal the April 9, 2008, order of the Henry Circuit Court granting summary judgment in favor of appellees Henry County, Kentucky; the Fiscal Court of Henry County, Kentucky; and Rumpke of Kentucky, Inc., and dismissing John Logan Brent as a party to the action. Because we find no error, we affirm.

On October 12, 2004, the appellants filed a complaint in the Henry Circuit Court alleging that a mandatory garbage collection ordinance, and the franchise fees[2] associated with the ordinance, violated Kentucky law. The appellants argued that the ordinance violated equal protection under the Kentucky Constitution by exempting residents of the county's incorporated cities. The appellants also argued that the franchise fee was unreasonable and invalid as an unnecessary revenue measure. Lastly, they argued that the county's dumpster franchise agreement was invalid for charging dumpster users in excess of the franchise agreement. On January 22, 2007, the appellees moved the Henry County Circuit Court for summary judgment on all the appellants' claims. In an order entered on April 9, 2008, summary judgment was granted in favor of the appellees. On April 17, 2008, the appellants filed a motion to vacate, alter, or amend and also

[2] A franchise is a privilege conferred on an individual, group, or company by a government. In this instance, Henry County is conferring the right to Rumpke of Kentucky to provide garbage collection services in Henry County. The franchise fee is the fee charged by Henry County for the right to provide its services. The fee is passed on as a charge to the customers receiving the service.

moved for class action certification. That motion was denied in an order entered on June 2, 2008. This appeal followed.

The standard of review of a trial court's grant of 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 is proper when it appears that it would be impossible for the adverse party to produce evidence at trial supporting a judgment in his favor. *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 276 (Ky. 1991). An appellate court must review the record in a light most favorable to the party opposing the motion and must resolve all doubts in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

The power to grant a franchise is given to municipalities pursuant to Kentucky Constitution §164, which states:

> No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor[e] publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway.

The appellants attack the issuance of the franchise fee on several levels, claiming primarily that it is excessive and illegal. "The burden is on the person who challenges the action of the legislative body as being unreasonable and

arbitrary to sustain that position where it does not appear on the face of the ordinance." *Conrad v. Lexington-Fayette Urban County Government*, 659 S.W.2d 190, 196 (Ky. 1983) (citing *Louisville & Jefferson County Metropolitan Sewer District v. Joseph E. Seagram & Sons*, 307 Ky. 413, 211 S.W.2d 122 (Ky. 1948)). "The law raises a presumption in favor of the validity of an ordinance and the burden is on the person attacking it to show its invalidity." *City of Paducah v. Johnson Bonding Co., Inc.,* 512 S.W.2d 481, 486 (Ky. 1974).

The appellants first argue that if the franchise fee implemented by Henry County is truly a franchise fee, then it is excessive and illegal. The appellants contend, in their brief, that the franchise fee imposed by Henry County constitutes 51 percent to 56 percent of the entire service charge. In its order, the Henry Circuit Court found that the franchise fee is approximately 30 percent of the total service charge. After reviewing the record, it appears that the franchise fee has changed each year since its creation. Therefore, it appears that not only is there a genuine issue as to what percentage of the service charge constitutes the franchise fee, but that there is also a genuine issue as to what percentage of the service charge constitutes the franchise fee *at any given time*.

While we would have been inclined to hold that the trial court improperly made findings of fact, the appellants stated, at oral argument, that by virtue of the dual motions for summary judgment, the parties believed that no genuine issues of material fact existed and that if they did, the trial court would have the authority to decide them. Although we do not necessarily agree with the

appellants' legal analysis, we accept it as a concession that no issues of material fact exist. In light of this concession, we are left to assume that the appellants' main contention is that the inferences drawn from the conceded facts are incorrect. However, this is simply another manner of arguing that the decision is wrong on the merits, and that is precisely the type of argument that is beyond our purview. It bears repeating that our task in reviewing a motion for summary judgment is to ensure that no issues of material fact existed and that the movant was entitled to judgment as a matter of law. However, if the appellants choose to concede that no issues of material fact exist, then we respect their concession and move on to determine whether the appellants could have produced evidence at trial supporting a judgment in their favor.

In support of their argument that the franchise fee is excessive and illegal, the appellants cite to a 1982 Attorney General Opinion, which states in pertinent part:

> 47 C.F.R. § 76.31 provides that franchise fees shall not exceed three percent (3%) of the franchisee's gross subscriber revenues per year from **cable TV operations** in the franchise area. If the franchise fee is in the range of 3 to 5 percent of such revenues, the fee shall be approved by the Commission (F.C.C.) if reasonable upon [further] showings . . . .

1982 Ky. Op. Att'y Gen. 2-181, Ky. OAG 82-163, 1982 WL 176802 (Ky.A.G.) (emphasis added). The appellants also cite to *Berea College Utilities v. City of Berea*, 691 S.W.2d 235 (Ky. App. 1985), which upheld as fair and reasonable a franchise fee of 3 percent of gross revenues for water and electricity distribution,

and *City of Owensboro v. Top Vision Cable Co. of Ky.*, 487 S.W.2d 283 (Ky. 1972), which held that a 25 percent franchise fee was unreasonable for cable television service.

As the circuit court pointed out, the cases to which the appellants cite are distinguishable from the facts at hand, in that they fail to address franchise fees for a solid waste program but rather address utility and cable television franchise fees. While the appellants cite to other sources in support of their argument, these sources address services such as waste management facilities, cable television, and rental vehicles, not garbage collection. There does not appear to be any legal basis for the appellants' contention that a franchise fee for mandatory garbage collection must comply with a reasonableness standard. In fact, the appellants have failed to cite to any source which sets any type of standard for a garbage collection franchise fee. As the appellants have failed to show that such a standard exists, whether the trial court found that such a standard was or was not met, is inconsequential.

Furthermore, assuming, *arguendo*, that a reasonableness standard did exist, whether a garbage collection franchise fee is reasonable would be best determined on a case-by-case basis. Unlike cable services, garbage collection services vary greatly from area to area. For example, urban areas, where the service provider has hundreds of residential customers in close proximity, may have smaller "reasonable" fees. On the other hand, rural areas, where the service provider may drive several miles before encountering a single customer, may have

larger "reasonable" fees. Accordingly, it appears that it would be impossible for the appellants to produce evidence at trial supporting a judgment in their favor.

The appellants next make several arguments that the fee is illegal if determined to be something other than a franchise fee. The first of these two arguments is that if the franchise fee is a regulatory fee, it is excessive and illegal. They maintain that because the garbage collection is made mandatory by the ordinance, then the county has exercised its police powers. As a result, the appellants argue that the fee levied can only be enough to cover the policing costs of the regulation and that the fees imposed by Henry County exceed such costs. All counties are given the power to implement solid waste management plans as well as to assess and collect fees associated therewith. *See* KRS 224.43-310 and KRS 224.43-010. Accordingly, the franchise fee implemented by Henry County appears to be just that – a franchise fee that is assessed in accordance with the county's solid waste management program. It appears that the trial court was not persuaded that the fee is a regulatory fee and neither are we. Accordingly, the appellants have failed to produce evidence that they would succeed on this argument at trial.

Next, the appellants argue that if the franchise fee is a tax, it is illegal because it fails to state a purpose as required by the Kentucky Constitution. In support of this argument, the appellants maintain that the fee is a tax because it is general revenue collected in an effort to balance the county-wide budget. The appellants have failed to establish this point. The appellants point to meeting

minutes in which the mandatory garbage collection was first discussed in relation to general budget restraints. However, we are of the opinion that creating new revenue for one portion of the budget that frees up previously delegated revenue for other budget areas does not earmark the new revenue as "general." Furthermore, the appellants have failed to show how the revenue generated by the franchise fee is being used for any purpose other than the funding of the Henry County solid waste program. According to KRS 224.43-010, solid waste management includes garbage collection. Furthermore, as affirmed by affiant County Judge/Executive John Logan Brent, franchise dollars are being used to help fund recycling, litter pick-up, dump clean-up, and enforcement and prosecution of solid waste ordinances. Again, the appellants have failed to support their assertion that the fee is a tax, and thus have failed to produce any evidence that would support such at trial.

The appellants next make several constitutional claims. The first is that Henry County violated the equal protection clauses of the Kentucky Constitution by imposing the franchise fee on only two-thirds of the county – those dwelling outside the incorporated cities – while requiring all citizens to participate in the mandatory collection. The appellants argue further equal protection violation by the division of three subclasses: residential, commercial, and dumpster users. The appellees argue that the case to which the appellants cite in support of this argument, *Weiand v. Board of Trustees of Kentucky Retirement Systems*, 25 S.W.3d 88 (Ky. 2000), is not only factually distinguishable but is also based on a

United States constitutional claim, not a Kentucky constitutional claim. However, the Supreme Court of Kentucky has held that the same rational basis test applicable to an equal protection claim under the United States Constitution is also applicable to an equal protection claim brought under the Kentucky Constitution.

> We hold that equal protection under the First, Second and Third Amendments to the Kentucky Constitution and the Fourteenth Amendment to the United States Constitution is validly accomplished as, in this case, when a statute involving the regulation of economic matters comports with both state and federal equal protection if the law is rationally related to a legitimate governmental objective. The constitutionality of a statute will be upheld if its classification is not arbitrary, or if it is founded upon any substantial distinction suggesting the necessity or propriety of such legislation.

Kentucky Harlan Coal Co. v. Holmes, 872 S.W.2d 446, 455 (Ky. 1994).

In a pleading filed on January 22, 2007, the appellees stated, in part:

> [a]s stated elsewhere, the five incorporated cities of Henry County had elected to enact their own garbage collection ordinances *prior* to Henry County enacting its mandatory garbage collection ordinance. Having done so, Henry County does not have statutory authority to collect a franchise fee from Rumpke for those residents, since those residents operate under the respective city's garbage collection ordinance, not Henry County's. Whether city residents are not specifically excluded from the County's mandatory garbage collection ordinance is more an oversight than it is grounds for invalidating and holding void the ordinance itself or the fees collected under it.

The circuit court's April 9, 2008, order reads, in pertinent part:

> Although the city dwelling county members are not required to pay the franchise fee, any benefits they receive from the occasional roadside cleanup is de

> minimus and fails to rise to the level of an equal protection violation. The non-incorporated citizens of Henry County are not a suspect class, as the city dwelling citizens are already paying for their own garbage collection services and have been since before the enactment of the ordinance. Clearly, the intent behind the divergent treatment is that the County does not wish to effectively double-charge the citizens living in incorporated areas, as they are already paying for their own waste management services.
>
> Upon applying a rational basis review to the franchise fee collection, the differing application passes muster as the difference is rationally related to a legitimate government interest. Driven by public health and welfare concerns, the ordinance has worthwhile community merit, and is mandated by Kentucky law. The classification is not arbitrary and Plaintiffs have failed to sustain their burden of proving that the ordinance violates equal protection. Therefore, the Court finds that the ordinance and associated franchise fees do not violate Equal Protection afforded by the Kentucky Constitution, as the franchise fees are expressly permitted under Kentucky law.

As previously stated, all Kentucky counties are given the power to implement solid waste management plans as well as assess and collect fees associated therewith. *See* KRS 224.43-310 and KRS 224.43-010. The purpose of solid waste management programs is to "protect the public health and welfare, prevent the spread of disease and creation of nuisances, conserve our natural resources, and enhance the beauty and quality of our environment." KRS 224.43-010(1). Accordingly, we agree with the circuit court and hold that the ordinance and the fees associated therewith are rationally related to a legitimate governmental objective. Furthermore, Henry County's distinction between incorporated and unincorporated residents is not arbitrary and is founded upon the distinction that

the city dwelling residents are already paying for garbage collection. Any language in the ordinance making the garbage collection mandatory for the entire county is inconsequential in that the incorporated residents were already participating in such a collection. Accordingly, the appellants have failed to show any likelihood of succeeding on these constitutional claims at trial.

Furthermore, as residential, commercial, and dumpster users require different levels of service, we hold that any discrepancies between each sub-class also rises to a rationally related government interest of providing quality garbage collection to all three classes at a cost that is equivalent to the services provided. Likewise, this sub-classification of services and associated fees is not arbitrary and is founded upon the distinction of services provided and therefore fails to rise to the level of an equal protection violation.

The appellants next argue that the fees collected from Rumpke have been improperly allocated to underfunded solid waste expenditures for years prior to the enactment of the ordinance. In support of this argument, the appellants cite to the *Instructional Guide for County Budget Preparation and State Local Finance Officer Policy Manual* as produced by the Division of Financial Management and Administration. The *Instructional Guide* states that it is "a reference tool for the development of the county budget." The section to which the appellants cite states:

> [t]he State Local Finance Officer will not consider amendments for prior years. Budget amendments are to be made at the time additional revenues are added to the

> budget; without doing so, the funds are not available for expenditure.

The appellants offer no other authority that Henry County cannot apply current franchise fees to prior years' solid waste budget deficits. As such, we are not satisfied that a "reference tool" serves as appropriate authority and consequently we are not satisfied that the appellants have met their burden on this point. We are persuaded even more by the fact that the budgets of Henry County have consistently been approved by the Governor's Office for Local Development, the very office which publishes the *Instructional Guide*. Accordingly, this argument fails as well.

The appellants also argue that the exclusive franchise given to Rumpke is invalid because the Henry County Fiscal Court did not state that the franchise was in the best interest of Henry County residents. In support of this argument, the appellants cite to an Attorney General opinion, which states, in relevant part:

> The fiscal court, through an ordinance, could grant an exclusive franchise for the franchise period, provided it makes a finding that such exclusive grant is in the public interest. The language in *Ray v. City of Owensboro*, Ky., 415 S.W.2d 77 (1967), strongly suggests that **the number of franchises to be granted by a fiscal court would be left to that body, depending upon public necessity**. The court said this at page 80:
>
> > "Appellant makes a strong argument that the franchise prohibits competition and this is bad under our free enterprise system. We agree that only where the public interest demands should competition be restrained or

> limited. However, many times excessive competition results in poor service and even no service. When, in the opinion of the legislative body, this state of facts exists then they have it within their power to take such measures as are necessary under the Constitution and laws to make service available."

1982 Ky. Op. Att'y Gen. 2-628, Ky. OAG 82-601, 1982 WL 177112 (Ky.A.G.) (emphasis added).

When addressing this argument, the circuit court stated:

> [the appellants] point out that a written finding that the ordinance is in the County's best interest is required for the regulation to be valid. However, the Court's interpretation of this Opinion is not nearly as strict, and fails to find that the omission of a specific, written finding of best interest voids the entire ordinance. The clear intent behind the Attorney General Opinions at issue here is that the fiscal court should expect that the ordinance will contribute to the benefit of the public. It is important to note here that the Kentucky statutory authority behind Henry County's power to enact solid waste management ordinances states the purpose in its legislation. The purpose is stated as
>
> > ". . . to provide for the management of solid waste, including reduction, collection, transportation, and disposal in a manner that will protect the public health and welfare, prevent the spread of disease and creation of nuisances, conserve our natural resources, and enhance the beauty and quality of our environment."
>
> The Court does not draw such strict categorizations here, and realizes that the true purpose behind this ordinance was to protect the health and welfare of all Henry County citizens. Plaintiffs' argument on this point is unpersuasive and the Court dismisses this claim.

Given the broad power and discretion granted to the counties to implement solid waste management plans, as well as the discretion noted in the number of franchises granted, we are in agreement with the circuit court. We are not convinced that a written finding that the franchise is in the best interest of the county is necessary to the grant of an exclusive solid waste collection franchise. We are greatly persuaded by the fact that the legislature which grants such power so clearly illustrates a broad array of interests met by the creation of waste management ordinances. Accordingly, the appellants fail at establishing this argument as well.

In conclusion, it appears that no genuine issues of material facts exist, as conceded by the appellants. It also appears that the appellants have failed to show any possibility that they would be able to produce evidence at trial supporting a judgment in their favor. Accordingly, we hold that the circuit court's grant of summary judgment was appropriate.

The appellants offered two final arguments to the Court: that a class action should be certified in this case and that defendant, County Judge/Executive John Logan Brent, should not have been dismissed as a party to the action. Because we have held that the summary judgment granted by the Henry County Circuit Court was proper, it is not necessary for us to address these arguments.

For the reasons stated herein, the April 9, 2008, order of the Henry Circuit Court is hereby affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANTS:

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BRIEF FOR APPELLEES:

Robert T. Watson
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ORAL ARGUMENT FOR APPELLEES:

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