

IN THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

COMPLETE STYLE OF THE CASE:

JIM BOEVING,

Respondent-Appellant,

v.

MISSOURI SECRETARY OF STATE JASON KANDER,

Respondent,

**MISSOURI STATE AUDITOR NICOLE GALLOWAY, RAISE YOUR HAND FOR
KIDS and ERIN BROWER,**

Appellants-Respondents.

DOCKET NUMBER WD79694
(Consolidated with WD79697 and WD79725)

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

Date: July 8, 2016

Appeal from:
Cole County Circuit Court
The Honorable Daniel R. Green, Judge

Appellate Judges:
Special Division: Alok Ahuja, P.J., Thomas H. Newton and Gary D. Witt, JJ.

Attorneys:
Charles W. Hatfield and Khristine A. Heisinger, Jefferson City, MO, for Respondent-Appellant,
Jim Boeving.

Chris Koster, Attorney General, Jeremiah J. Morgan, Deputy Solicitor General, and Curtis
Schube, Assistant Attorney General, Jefferson City, MO, for Respondent, Jason Kander.

Paul Harper and Yamini Laks, Jefferson City, MO, for Appellant-Respondent, Nicole Galloway.

Edward D. Greim and Alan T. Simpson, Kansas City, MO, for Appellants-Respondents, Raise
Your Hand for Kids and Erin Brower.

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

JIM BOEVING,

Respondent-Appellant,

v.

MISSOURI SECRETARY OF STATE, JASON KANDER,

Respondent,

**MISSOURI SECRETARY OF STATE NICOLE GALLOWAY, RAISE YOUR
HAND FOR KIDS and ERIN BROWER,**

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WD79694 (Consolidated with WD79697 and WD79725)

Cole County

Before: Special Division: Alok Ahuja, P.J., Thomas H. Newton and Gary D. Witt, JJ.

Missouri resident and taxpayer Jim Boeving filed suit in the Circuit Court of Cole County to challenge the fairness and sufficiency of both the summary statement and the fiscal note summary contained in the official ballot title for an initiative petition. The petition seeks to amend the Missouri constitution to increase the taxes and fees to be paid on the sale of cigarettes, and to use the revenues to fund programs addressing children's health and education.

The circuit court held that the summary statement for the initiative prepared by the Secretary of State was not unfair and insufficient, but that the fiscal note summary was inadequate. This appeal follows.

**REVERSED, AND REVISED SUMMARY STATEMENT LANGUAGE CERTIFIED
TO THE SECRETARY OF STATE.**

Special Division holds:

We conclude that the second bullet point in the summary statement is inadequate. It states that the initiative will "create a fee paid by cigarette wholesalers of 67 cents per pack of 20 on certain cigarettes." The initiative, however, establishes an equity assessment fee which will *begin* at \$.67 per pack in 2017, but which is required to increase every year thereafter by 3% or the annual increase in the Consumer Price Index, whichever is greater. The statement that the

initiative will “create a fee . . . of 67 cents” would suggest to a reasonable voter that the fee is established as an unchanging sum-certain. But that is not true, due to the mandatory, perpetual annual increases to which the fee is subject. Nothing in the summary statement would alert a voter to this mandatory, perpetual, annual increase in the equity assessment fee, or would signal that the voter should investigate the issue further before voting. Adding the phrase “which fee shall increase annually” at the end of the second bullet point will remedy the deficiency we have identified.

Boeving also challenges the summary statement’s third bullet point, arguing that it is insufficient and unfair because it fails to inform voters how the proceeds of the initiative would be used. We find the ballot title accurately advises voters that the revenues generated by the new taxes and fees will be deposited into the Early Childhood Health and Education Trust Fund, and that “[t]he revenue [generated by the proposal] will fund only programs and services allowed by the proposal.” Although the ballot title does not explicitly state the purposes for which revenues will be expended, we believe that the name of the Fund, and the statement that funds will be used for activities allowed by the proposal, accurately, if generally, describes the purposes to which funds will be put, and alerts interested voters to investigate further.

As for the Auditor’s fiscal note summary, the trial court found the fiscal note summary deficient for two reasons. First, the court concluded that the Auditor acted unreasonably by including in the fiscal note summary the Department of Revenue’s estimate of a \$374 million increase in State revenues, because the Department of Revenue assumed that cigarette consumption would be unchanged despite the new taxes and fees (in other words, assumed a “zero price elasticity of demand”). The Auditor is not required to second-guess economic assumptions underlying the fiscal submissions she receives, however, and the Auditor had plausible grounds for finding that the Department of Revenue’s revenue estimate was not so speculative as to justify excluding it from the fiscal note summary.

The circuit court also held that the fiscal note summary was inadequate for stating that local fiscal impact was “unknown,” even though the Office of Administration had estimated a loss of local sales tax revenues of \$10.4 million. The Auditor reasonably determined that the Office of Administration’s submission did not in fact “quantify” an expected decrease in local sales tax revenues, because it did not reflect the operation of a “hold harmless” provision in the initiative, which would compensate certain local sales tax losses which were “directly caused” by the initiative. Use of the word “unknown” adequately represents to the public what can be said about the initiative’s potential financial consequences on local entities.

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