REPRESENTATIVES FOR PETITIONERS: Zia Mollabashy, Randal Kaltenmark, Barnes & Thornburg, LLP

REPRESENTATIVE FOR RESPONDENT: Jess Reagan Gastineau, Office of Corporation Counsel

BEFORE THE INDIANA BOARD OF TAX REVIEW

Robert A. and Louann Palmer,	)	
	)	
	)	Petition Nos.: 49-400-13-3-5-01773-16
Petitioners,	)	49-400-13-3-5-01777-16
	)	49-400-14-3-5-01774-16
	)	49-400-14-3-5-01778-16
	)	49-400-15-3-5-10775-16
v.	)	49-400-15-3-5-01779-16
	)	
	)	Parcel Nos.: 49-01-30-116-004.000-400
	)	49-01-30-116-005.000-400
Marion County Assessor,	)	
	)	
	)	
Respondent.	)	Assessment Years: 2013-2015
	)	
	)	

November 14, 2018

FINAL DETERMINATION GRANTING SUMMARY JUDGMENT IN FAVOR OF THE MARION COUNTY ASSESSOR

I. Introduction

1. Robert and Louann Palmer moved for summary judgment on Form 133 petitions in which they claimed the Marion County Auditor should have given them a credit that effectively caps taxes for homesteads at 1% of gross assessed value instead of the credit that applies to other residential property and caps taxes at 2%. Before 2013, to qualify as

a "homestead" for purposes of the tax-cap statute, a property simply had to be eligible for the standard deduction under Ind. Code § 6-1.1-12-37, regardless of whether the taxpayer had applied for or been granted that deduction. In 2013, however, the legislature amended the tax-cap statute to require property to have been granted the standard deduction in order to qualify for the 1% cap. Because the undisputed evidence shows that the Palmers had neither applied for nor been granted the standard deduction, they are not entitled to the 1% cap for 2013-2015. We therefore deny the Palmers' summary judgment motion and enter summary judgment for the Assessor.

II. Procedural History

2. On June 20, 2016, the Palmers filed eight Form 133 petitions for correction of error. The petitions addressed two parcels and covered tax years 2012-2015. The six petitions covering 2013-2015 are at issue in this Final Determination.[1] The Palmers alleged that their taxes, as a matter of law, were illegal; that there were mathematical errors in computing their assessment; and that through an error of omission, they were not given a credit permitted by law. All of their claims centered on having been denied the 1% cap for homesteads under Ind. Code § 6-1.1-20.6-7.5(a)(1).

3. A little over a month later, the Marion County Property Tax Assessment Board of Appeals issued notices denying all the petitions on grounds that the Palmers did not apply for "the deduction" for the years under appeal. The Palmers responded by filing their Form 133 petitions with us.

4. On May 1, 2018, the Palmers filed a motion for summary judgment and supporting brief. The motion covered all eight petitions, including the two for 2012. The Palmers offered the following designated evidence in support of their motion:

[1] We are issuing a separate order on the two petitions addressing the 2012 tax year.

Affidavit of Robert A. Palmer[2]
Affidavit of Louann T. Palmer

Exhibit A:	The Palmers' 2011-2014 Indiana tax returns and one page from their 2015 return **(Confidential)**
Exhibit B:	Print screens from the Palmers' driver's records with the Indiana Bureau of Motor Vehicles
Exhibit C:	Bills from Indianapolis Power & Light Co.
Exhibit D:	Bills from Citizens Energy Group
Exhibit E:	Bank statements **(Confidential)**
Exhibit F:	Property tax payment history for the Palmers
Exhibit G:	Cover letter to Marion County Auditor with Form 133 petitions and Form 17T refund claims
Exhibit H:	"Notification of Disposition on Petition for Correction of Error" for each parcel and year under appeal
Exhibit I:	Cover letter to Board with Form 133 petitions and attachments

5. The Assessor did not file a response within 30 days. In light of the Assessor's failure to respond, on June 11, the Palmers filed a notice indicating that their summary judgment motion was ripe for determination. The next day, the Assessor filed a motion requesting an extension of time to respond to the summary judgment motion, and he eventually filed a motion styled as a response to the Palmers' summary judgment motion and a motion to dismiss ("Response").

6. After various filings addressing the propriety of the Assessor's untimely Response, including the Palmers' motion to strike that Response, our designated administrative law judge, David Pardo ("ALJ"), issued his Order Denying Motion for Extension of Time, Granting Motion to Strike, and Setting Hearing. Although he struck the Response, the ALJ set the Palmers' summary judgment motion for an August 22, 2018 hearing. The ALJ indicated that the Assessor would not be precluded from arguing (1) that the Palmers

[2] Our file did not appear to include Robert Palmer's affidavit, although the Palmers indicated that they filed the affidavit with their summary judgment motion and the parties agree that the Palmers served it on the Assessor. Following a conference with our administrative law judge, the Palmers filed a Submission Referencing Designated Evidence attaching a copy of the affidavit. The parties do not dispute that the affidavit is properly before us.

failed to meet their initial burden on summary judgment, or (2) that the Assessor was entitled to summary judgment in his favor on the issues raised by the Palmers' motion.

III. Motion to Strike the Palmers' Affidavits

7. At the hearing, the Assessor moved to strike the Palmers' affidavits on grounds that the Palmers did not specify they were signing those affidavits under the penalties for perjury, as required by Indiana Trial Rule 11(B). The Assessor later re-characterized his motion as an objection to the affidavits' sufficiency.[3] Because the Assessor had not previously raised the issue, the ALJ gave the Palmers through September 12, 2018, to respond.

8. We deny the Assessor's motion to strike/objection. The Assessor waived the right to contest the Palmers' designated evidence when he failed to timely file either a response to their summary judgment motion or a request for extension of time within which to file a response. *See Homeq Servicing Corp. v. Baker*, 883 N.E.2d 95, 98 (Ind. 2008) (*citing Borsuk v. Town of St. John*, 820 N.E.2d 118, 123 n.5 (Ind. 2005)) ("[W]hen a nonmoving party fails to respond to a motion for summary judgment within 30 days by either filing a response, requesting a continuance under Trial Rule 56(I), or filing an affidavit under Trial Rule 56(F), the trial court cannot consider summary judgment filings of that party subsequent to the 30-day period."). While the ALJ explained that the Assessor could argue at the hearing about whether the Palmers met their initial burden on summary judgment, that right did not extend to challenging the admissibility of the Palmers' designated evidence. Instead, the Assessor was free to argue whether the evidence, which was unopposed and therefore already admitted for purposes of summary judgment, entitled the Palmers to judgment as a matter of law.

[3] It is unclear what the Assessor's counsel meant when she said she would withdraw the motion to strike and would instead "object" only to the affidavits' sufficiency. She may have meant that she was withdrawing any argument about whether the affidavits were properly affirmed and that she was instead contesting only whether the factual statements in the affidavits were sufficient to support the Palmers' motion for summary judgment. The ALJ did not understand that to be the case, and he gave the Palmers a chance to respond to the Assessor's arguments about affirmation. Counsel did not correct the ALJ on his understanding. Because we cannot say that the Assessor clearly withdrew his motion, we choose to address the issue.

9. Waiver aside, we disagree with the substance of the Assessor's motion/objection. Our state supreme court addressed a remarkably similar scenario in *Jordan v. Deery*, 609 N.E.2d 1104 (Ind. 1993). In *Jordan*, the defendants contested a doctor's notarized affidavit that began with the statement, "Affiant, Deborah McCullough being duly sworn upon her oath alleges and says" on grounds that the affidavit was not properly verified. *Jordan*, 609 N.E.2d at 1109. While the defendants conceded that the doctor swore she had made the statements contained in the affidavit, they argued that she did not swear the statements were true, as required by Trial Rule 11(B). *Id*.

10. The court disagreed, finding that the notary jurat evidenced the fact that the affidavit had been duly sworn before an officer authorized to administer oaths. According to the court, while "Trial Rule 11 provides one method for binding an affiant to his oath, compliance with its provisions is not required." *Jordan*, 609 N.E.2d at 1110. Instead, Trial Rule 56 allows courts addressing summary judgment motions to rely on "affidavits," which are simply written statements of fact sworn to as the truth before an authorized officer. *Id*. The court explained that the "chief test" of an affidavit's sufficiency is its "ability to serve as a predicate for a perjury prosecution." *Id*. It held that document at issue subjected the doctor to prosecution for making a false affidavit and therefore constituted an affidavit. *Id*.

11. The Palmers' affidavits are virtually indistinguishable from the doctor's affidavit in *Jordan*. They contain notary jurats as well as separate indications that the Palmers' statements were sworn. They subject the Palmers to prosecution for making a false affidavit and therefore meet the requirements of Trial Rule 56.

12. The cases the Assessor cites—*Jones v. State*, 517 N.E.2d 405 (Ind. 1988) and *Huntington County Cmty. School Corp. v. State Bd. of Tax Comm'rs*, 757 N.E.2d 235 (Ind. Tax Ct. 2001)—do not counsel otherwise. Neither case involved summary judgment proceedings

or affidavits—*Jones* involved motions for change of venue and for appointment of a special prosecutor, and *Huntington County Cmty. School Corp.* involved a petition for remonstrance. *Jones*, 517 N.E.2d at 406-07; *Huntington County Cmty. School Corp.*, 757 N.E.2d at 236-37. In each case, a statute or trial rule required the petition or motion to be verified. *Id.* In neither case was the petition or motion sworn to before a notary or other officer authorized to administer oaths. *Id*. Indeed, it does not appear that the remonstrators in *Huntington County School Cmty. Corp.* attempted to verify their petition in any way.

III. Undisputed Facts

13. The property at issue in these appeals consists of two adjoining lots—9330 and 9320 Sandbury Road. The Palmers bought the first lot (9330 Sandbury Road) in March 2005 and built their home on it within a year. They bought the second lot in August 2007. The home is their only residence. They did not own, lease, or reside at any other residential property from 2012 through 2016. *Louann Palmer Aff. at ¶¶ 3, 5; Robert Palmer Aff. at ¶¶ 3, 5.*

14. From 2006 forward, the Palmers identified 9330 Sandbury Road as their residence when registering to vote. They also listed it as their address on their tax returns and with the Indiana Bureau of Motor Vehicles. And they received mail at that address, as shown by copies of bills from Indianapolis Power & Light Company, Citizens Energy Group, and Fifth Third Bank. *Louann Palmer Aff. at ¶¶ 6-7, 9-11; Robert Palmer Aff. at ¶¶ 6-7, 9-11; Exs. A-E.*

15. The Palmers did not file a sales disclosure form for either parcel. In November 2016, they filed a form seeking a "homestead deduction," which refers to the standard deduction provided by Ind. Code § 6-1.1-12-37. For tax years 2012-2015, they did not receive either the standard deduction or the supplemental deduction provided by Ind.

Code § 6-1.1-12-37.5. *See Louann Palmer Aff. at ¶ 4; see also, Robert Palmer Aff. at ¶ 4.*

IV. Conclusions of Law

A. Summary judgment standard

16. Our procedural rules allow parties to move for summary judgment "pursuant to the Indiana Rules of Trial Procedure." 52 IAC 2-6-8. Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Wittenberg Lutheran Village Endowment Corp. v. Lake Cnty. Prop. Tax Assessment Bd. of Appeals*, 782 N.E.2d 483, 487 (Ind. Tax Ct. 2002). The party moving for summary judgment must make a prima facie showing of both those things. *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522, 526 (Ind. Ct. App. 2004). If the movant satisfies its burden, the non-movant cannot rest upon its pleadings but instead must designate sufficient evidence to show that a genuine issue exists for trial. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). *Id.* In deciding whether a genuine issue exists, we must construe all facts and reasonable inferences in favor of the non-movant. *See Carey v. Ind. Physical Therapy, Inc.*, 926 N.E.2d 1126, 1128 (Ind. Ct. App. 2010).

B. Because the Palmers were not granted the standard deduction for the years at issue, they failed to qualify for the 1% cap as a matter of law

17. There are several potential benefits available to homeowners under our property tax statutes. Some or all of their property may qualify for the standard and supplemental deductions. Those deductions apply to homesteads, which the standard-deduction statute defines in relevant part as a property owner's "principal place of residence" that "consists of a dwelling and the real estate, not exceeding one (1) acre, that immediately surrounds that dwelling." I.C. § 6-1.1-12-37(a)(2).

18. All property owners also receive a credit under Ind. Code § 6-1.1-20.6-7.5, often called a "tax cap," against taxes that exceed a specified percentage of their property's gross

assessment. That "cap" varies based on the type of property at issue. For property defined as a "homestead" under the tax-cap statute, taxes are capped at 1% of gross assessed value. I.C. § 6-1.1-20.6-7.5(a)(1). The caps are higher for other types of property. I.C. § 6-1.1-20.6-7.5(a)(2)-(6).

19. Before May 11, 2013, the tax-cap statute defined a "homestead" as "a homestead *that is eligible for* a standard deduction under IC 6-1.1-12-37." I.C. § 6-1.1-20.6-2(a) (2012). We have interpreted that language to mean that taxpayers need not have applied for or been granted a standard deduction in order for their property to qualify as a homestead under the tax-cap statute. *See Martin v. Ripley Cnty. Ass'r*, pet. no. 69-003-09-1-5-00001 (IBTR Dec. 2, 2011) As support for our interpretation, we pointed to Ind. Code § 6-1.1-20.6-8, which did not require taxpayers to apply for the tax cap credit, but instead required the county auditor to identify properties eligible for the credit and apply it. *Id.* (*citing* I.C. § 6-1.1-20.6-8).

20. Effective May 13, 2013, however, the legislature amended the definition of a "homestead" for purposes of the tax-cap statute. A homestead is now defined as "a homestead *that has been granted* a standard deduction under IC 6-1.1-12-37." I.C. § 6-1.1-20.6-2(a) (2013); 2013 Ind. Acts 257, § 28. The undisputed facts show that the Palmers neither applied for nor received the standard deduction for any of the years at issue. Thus, under the statute's plain language, the Palmers are not entitled to the 1% cap for homesteads.

21. According to the Palmers, our reading of the statute requires taxpayers to apply for a homestead credit and therefore conflicts with Ind. Code § 6-1.1-20.6-8. We disagree. Homeowners must apply for the standard deduction. Once that deduction has been granted, however, they need take no further action to get the 1% cap for homesteads. Instead, the auditor must affirmatively (1) identify the properties that have been granted the deduction, and (2) apply the 1% cap to the owners' taxes. In any case, the

legislature's intent in amending Ind. Code § 6-1.1-20.6-2(a) statute is clear—mere eligibility for the standard deduction no longer suffices to qualify for the 1% cap. A property must have been granted that deduction.

22. The Palmers disagree, citing *Holdsworth v. Boone Cnty. Ass'r*, pet. no. 06-003-14-3-5-00118-16 (IBTR June 13, 2017), a case involving the 2014 assessment year. There we cited to Ind. Code § 6-1.1-20.6-8 in finding that taxpayers who failed to prove that they applied for a standard deduction were nonetheless entitled to the 1% cap because the property was their principal place of residence and qualified as a homestead under the standard deduction statute. While that might have been true under the tax-cap statute before the 2013 amendment to Ind. Code §6-1.1-20.6-2(a), it was not true after that amendment. We did not discuss the amendment in our decision.

23. The Assessor, however, cites to *Key Enterprises, Inc. v. Delaware Cnty. Ass'r*, pet. nos. 18-019-15-3-5-00925-17 et. al. (IBTR Mar. 20, 2018), a case in which we recognized and applied the 2013 amendment to Ind. Code § 6-1.1-20.6-2. In any event, to the extent *Holdsworth* stands for the proposition that, following the 2013 amendment to Ind. Code § 6-1.1-20.6-2(a), homeowners are entitled to the 1% tax-cap for properties that have not been granted the standard deduction, it was wrongly decided. Although our decisions do not carry precedential value,[4] we encourage taxpayers and assessing officials to read them, and we recognize the importance of consistency in our decision-making. But where we later discover that a decision is wrong, we will not perpetuate that error by continuing to adhere to it.

24. The Palmers also argue that our reading of the tax-cap statute conflicts with the Article 10, section 1 of the Indiana Constitution. That article directs the legislature to limit a taxpayer's liability on property he owns and uses as his principle place of residence to no

[4] *See Pulte Homes of Indiana, LLC v. Hendricks Cnty. Ass'r,* 42 N.E.3d 590, 595 (Ind. Tax Ct. 2015) (explaining that an administrative decision by the Board had no precedential value).

more than 1% of its gross assessed value but says nothing about a taxpayer having to apply for that benefit. Ind. Const. Art. X, § 1(c)(4), (f)(1). The Palmers' argument conceivably might carry some weight were it necessary to construe the tax-cap statute. *See, e.g., Baldwin v. Reagan*, 715 N.E.2d 332, 338 (Ind. 1999) ("If there is more than one reasonable interpretation of a statute, at least one of which is constitutional, we will choose that path which permits upholding the act."). But as we have already explained, there is nothing to construe—we are simply applying the statute's plain meaning. If the Palmers believe the statute conflicts with the Indiana Constitution, their remedy lies elsewhere. We have no authority to declare a statute unconstitutional. *See Bielski v. Zorn*, 627 N.E.2d 880, 887-88 (Ind. Tax Ct. 1994) ("[T]he State Board and its subordinate local officers and agencies have no authority whatsoever to determine the constitutionality of a statute.").

25. There is no genuine issue of material fact in these appeals. The Palmers, however, are not entitled to judgment as a matter of law. To the contrary, the undisputed fact that the Palmers were not granted the standard deduction entitles the Assessor to judgment as a matter of law. When any party has moved for summary judgment, we may grant summary judgment for the opposing party on the issues raised in that motion. Ind. Trial Rule 56(B). We therefore grant summary judgment for the Assessor.

V. Final Determination

26. We deny the Palmers' motion for summary judgment and grant summary judgment in the Assessor's favor. The Palmers are not entitled to any relief on their Form 133 petitions for the 2013-2015 tax years.

This Final Determination of the above captioned matter is issued by the Indiana Board of Tax Review on the date written above.

_____
Chairman, Indiana Board of Tax Review

_____
Commissioner, Indiana Board of Tax Review

_____
Commissioner, Indiana Board of Tax Review

- APPEAL RIGHTS -

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5 and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required not later than forty-five (45) days after the date of this notice. The Indiana Code is available on the Internet at <http://www.in.gov/legislative/ic/code>. The Indiana Tax Court's rules are available at <http://www.in.gov/judiciary/rules/tax/index.html>.