STATE OF MICHIGAN

COURT OF APPEALS

FAMILIES AGAINST INCINERATOR RISK, WILLIAM RINEY and PAUL FORTIER,

Plaintiff-Appellants,

v

PEGGY HAINES, as County Clerk, and PEGGY HAINES, DIANE HILL, LUANN KOCH and ANDY FANTA, as Washtenaw County Election Scheduling Committee,

Defendant-Appellees.

and

BRENDA STUMO, Ypsilanti Township Clerk, KAREN LOVEJOY ROE, Ypsilanti Township Supervisor, and LARRY DOE, Ypsilanti Township Treasurer

Intervening Defendants-Appellees

UNPUBLISHED
July 29, 2004

No. 245319
Washtenaw Circuit Court
LC No. 02-823-CZ

Before: Judges Sawyer, P.J., Gage and Owens, JJ.

PER CURIAM.

Plaintiffs appeal by right an order denying their motion for summary disposition and granting summary disposition to defendants and intervening defendants. This case arose after the county clerk informed plaintiffs that they had insufficient signatures to pursue a recall election against the three township officials. We affirm in part, reverse in part, and remand.

Plaintiffs first argue that several signatures should not have been invalidated even though the circulator was not registered in the township. We disagree.

A trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(10) is reviewed de novo to determine whether an issue of material fact existed or whether the moving party was entitled to judgment as a matter of law. *Meyer v City of Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000). Issues of statutory interpretation are also

reviewed de novo. *Kent Co Aeronautics Bd v Michigan State Police Dep't*, 239 Mich App 563, 572; 609 NW2d 593 (2000), aff'd 463 Mich 652 (2001). "Constitutional issues and construction are questions of law and are reviewed de novo on appeal." *Studier v Michigan Public School Employees' Retirement Bd*, 260 Mich App 460, 467; 679 NW2d 88 (2004).

Although MCL 168.957 requires a circulator to be "a qualified and registered elector in the electoral district of the official sought to be recalled," and our Supreme Court has indicated that the secretary of state properly rejected petitions where none of the circulators were registered and qualified electors, *Keyes v Secretary of State*, 360 Mich 610, 617; 104 NW2d 781 (1960), plaintiffs argue that the United States Supreme Court found a similar Colorado provision to be unconstitutional. In *Buckley v American Constitutional Law Foundation, Inc*, 525 US 182, 186; 119 S Ct 636; 142 L Ed 2d 599 (1999), the United States Supreme Court considered the constitutionality of Colorado's statute requiring a circulator of an initiative petition to be registered. The Court found that "'the requirement that circulators be not merely voter eligible, but registered voters . . . . "limi[ts] the number of voices who will convey [the initiative proponents'] message" and, consequently, cut[s] down 'the size of the audience [proponents] can reach'" *Id.* at 194-195, quoting *Meyer v Grant*, 486 US 414, 422-423; 108 S Ct 1886; 100 L Ed 2d 425 (1988).

Nevertheless, the United States Supreme Court noted that there was no bright line rule separating "valid ballot-access provisions from invalid interactive speech restrictions." *Buckley, supra* at 192. This indicates that *Buckley* should be narrowly drawn. The Michigan Legislature appears to have made a distinction between the registration requirement for a petition circulator with respect to an initiative and the registration requirement for a recall petition circulator.

MCL 168.544c prescribes the form of the petition used with respect to constitutional amendment proposals, initiatives, referendums, recalls, and candidacy nominations. MCL 168.482(6); MCL 168.952; MCL 168.544. The Legislature amended MCL 168.544c by 1999 PA 219, apparently in direct response to the United States Supreme Court's 1999 holding in *Buckley*. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505; 475 NW2d 704 (1991) (the Legislature is presumed to act with knowledge of administrative and appellate court statutory interpretations). Before the amendment, MCL 168.544c(3) mandated that all petition circulators be registered. 1993 PA 137.

Changes in an act must be construed in light of predecessor statutes and historical developments, *MD Marinich, Inc v Michigan Nat Bank*, 193 Mich App 447, 452; 484 NW2d 738 (1992), and a change in a statutory phrase is presumed to reflect a change in the meaning, *Edgewood Development, Inc v Landskroener*, ___ Mich App ___, ___; ___ NW2d ___ (2004) slip op at 4. The change in the statute only exempted petition circulators under MCL 168.482 from the registration requirement; it did not exempt recall petition circulators who are governed by MCL 168.957[1] and MCL 168.952. MCL 168.482 governs constitutional amendment

[1] MCL 168.957 provides in relevant part, "a person circulating a petition shall be a qualified and registered elector in the electoral district of the official sought to be recalled."

proposals, initiatives, and referendums. Thus, the Legislature indicated an intent to revise MCL 168.544c to conform to the holding in *Buckley*, but to construe the *Buckley* holding narrowly.

Therefore, assuming the Legislature's distinction between initiative and recall petitions is constitutional, *Buckley* does not apply to the instant case. Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent. *McDougall v Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999). Moreover a statute should be construed in a manner that renders it constitutional unless the construction would destroy legislative intent. *Smeets v Genesee Co Clerk*, 193 Mich App 628, 635; 484 NW2d 770 (1992). "When interpreting the constitution, the primary duty of the judiciary is to 'ascertain as best the Court may the general understanding and therefore the uppermost or dominant purpose of the people when they approved the provision or provisions.'" *BINGO Coalition for Charity – Not Politics v Bd of Canvassers*, 215 Mich App 405, 409; 546 NW2d 637 (1996), quoting *Michigan Farm Bureau v Secretary of State*, 379 Mich 387, 390-391; 151 NW2d 797 (1967).

While the constitution provided a right of recall, Const 1963, art 2, § 8, it also directed the Legislature to enact legislation regulating time, place, and manner of elections, Const 1963, art 2, § 4. And the convention comment indicated that the Legislature had full authority to administer elections and was required to enact legislation to prevent corrupt practices. Convention comment, Const 1963, art 2, § 8. Moreover, a petition for recall must contain the signatures of twenty-five percent of the people who voted in the last gubernatorial election, Const 1963, art 2, § 8, while an initiative petition must only contain the signatures of eight percent, Const 1963, art 2, § 9. This would indicate that the makers of the constitution did not intend to treat recall petitions and initiative petitions alike. Therefore, the distinction made by the Legislature was constitutional.

Plaintiffs next argue that the county clerk improperly invalidated 287 of 303 signatures on the ground that the handwriting in address or date column was not that of the signers because the clerk was not permitted to engage in handwriting analysis with respect to printed addresses and dates. We agree.

The trial court noted that MCL 168.961 required the clerk to compare petition names to registration records, and MCL 168.954 required signers to write their name, address, and the date they signed the petition. While in *Jaffe v Oakland Co Clerk*, 87 Mich App 281, 285; 274 NW2d 38 (1978), this Court found that MCL 168.961 did not require the clerk to compare signatures on the petition with the signatures on the registration cards, this Court did not find that comparison of signatures was forbidden. Although *Jaffe* was decided before November 1, 1990, and is not binding precedent, MCL 7.215(J)(1), its reasoning is persuasive. After this Court's decision in *Jaffe*, the Legislature amended MCL 168.961. 1978 PA 533. The amendment was substantially similar to the current version of the statute.

Notably, the amendment required the clerk to compare the names on the petition to the registration records, but gave the clerk discretion whether to compare to the signatures on the registration cards or the registration lists. Thus, the amendment appeared to conform to this Court's decision in *Jaffe* – that comparison of signatures was permitted but not required. Reenactment of a statute following administrative or judicial construction sanctions that construction. *Smith v Detroit*, 388 Mich 637, 650; 202 NW2d 300 (1972). Therefore, the

common-law doctrine precluding a clerk from analyzing handwriting was abrogated. Nevertheless, while a clerk can analyze signatures, the clerk may not use handwriting analysis on addresses. The only purpose in comparing a name to an address is to verify that the person signing is registered to vote in the township. Assuming that the signature matches the voter registration card, the clerk may not invalidate an otherwise valid signature on the basis that the handwriting in the address and date column was determined not to be that of the signer.

Plaintiffs next argue that a name may not be invalidated merely because the "signature" is printed rather than written in cursive. Plaintiffs also argue that one name was improperly invalidated because the signer wrote the initial of her first name and her full last name rather than signing both her first and last names. We agree.

"Signatures printed by a typewriter must be rejected, but signatures appearing in printed handwriting of the signer should be accepted. The word signature is comprehensive enough to include the printed name." *Michigan State Dental Society v Secretary of State*, 294 Mich 503, 513-514; 293 NW 865 (1940) Moreover, "[w]hen the surname appears in full and the given name by initials only, the signature must be accepted." *Id.* at 513. Invalidation was improper.

Plaintiffs next argue that the court improperly granted summary disposition to defendants and intervenors where plaintiffs presented evidence showing that 36 of the 37 invalidated signers were actually listed on the qualified voter file when they signed the petitions. We agree that summary disposition was inappropriate.

MCL 168.961(6) indicates that the qualified voter file was required to show that the signer was registered to vote, and was registered to vote in Ypsilanti Township on the date the signer signed the petition, or the signature was presumed invalid. As required by MCR 2.116(G)(3), plaintiffs submitted an affidavit by William A. Simpson indicating that he compared the petition signatures with the names in the qualified voter file and determined that 36 of the 37 invalidated signatures were in fact included in the qualified voter file. Defendants presented in opposition the affidavit of the Washtenaw County Election Administrator stating that certain signatures were invalidated because she and others determined, after reviewing the qualified voter file, that the signers were not registered voters when the petition was signed. *Id.* The affidavit submitted by defendants directly contradicted the affidavit provided by plaintiffs, thus creating an issue of material fact with respect to whether the signers were registered when the petition was signed. Because a court may not make findings of fact when deciding a summary disposition motion, *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994), summary disposition was not appropriate.

Plaintiffs next argue that seventy-two names should not have been invalidated where the circulators provided their street address and stated that they were registered to vote in Ypsilanti Township, all of which is served by one post office. We disagree.

MCL 168.544c(1), as it was written when the petitions were circulated and filed, provided a place on the petition for the circulator's post office. 1999 PA 219. Moreover, MCL 168.957 specifically required the circulator to attach to the petition a certificate stating the circulator's post office address. Where the certificate of the circulator does not comply with the act, the filing official may not count the signatures on the petition sheet. MCL 168.961(2).

Plaintiffs next argue that ditto marks are acceptable in the address column, and the clerk improperly invalidated thirteen names on this ground. We agree.

"[D]itto marks have such a clear and definite meaning that their use cannot be held objectionable," *Thompson v Secretary of State*, 192 Mich 512, 526-527; 159 NW 65 (1916), and well-known abbreviations and ditto marks are acceptable, *Michigan State Dental Soc*, *supra* at 514. Intervenors argue that *Schmidt v Genesee Clerk*, 127 Mich App 694, 697-698; 339 NW2d 526 (1983), precluded the use of irregularities such as ditto marks. In *Schmidt*, we noted that MCL 168.954 clearly required the signer to personally write the date, *id.*, at 701, but we did not indicate whether the dates could be filled in with ditto marks *id.*, at 704.

Although *Michigan State Dental Soc*, *supra*, and *Thompson*, *supra*, involved initiative and referendum petitions while the instant action involves a recall petition, "The laws relating to nominations and elections shall govern all nominations and elections under this act insofar as is not in conflict herewith." MCL 168.976. Moreover, MCL 168.964 provides in relevant part, "[t]he procedure governing the election on the question of the recall of an officer shall be the same, so far as possible and unless otherwise provided in this act, as that by which the officer is elected to office." Moreover, while MCL 168.954 requires the signer to personally fill in the required information, the plain language of the statute does not prohibit the use of ditto marks. And while the secretary of state may promulgate rules establishing *uniform* standards for state and local nominating, recall, and ballot question petition signatures, MCL 168.31(2), a rule is not promulgated unless it is published in the Michigan administrative code. MCL 24.246. No rules have been published in the Michigan administrative code with respect to petition signatures.

Plaintiffs next argue that eleven names should not have been invalidated on the ground that the post office was omitted where the street addresses clearly indicated that the signers lived in Ypsilanti Township. We disagree.

MCL 168.552a(2) provided that if the addresses included Ypsilanti Township, the post office or zip code were not required. However, in viewing the names that were invalidated because no post office or zip code was listed, we note that the township was not listed in the addresses. Nevertheless, plaintiffs argue that *Schmidt*, *supra* at 703, stated that failure to provide the post office did not disqualify a signature where the street address was provided. Plaintiffs misconstrue this Court's holding. This Court determined that the signer was not required to personally fill in the post office, *id.*, not that the post office could be left blank.

Plaintiffs next argue that the court improperly granted summary disposition to defendants and intervening defendants. We agree.

If a request for declaratory relief encompasses a mandamus action, the trial court may "inquire into the true nature of the relief sought." *Ferency v Secretary of State*, 139 Mich App 677, 683; 362 NW2d 743 (1984). MCL 168.963(2) instructs the clerk to submit a proposed date to the election scheduling committee if the petition is sufficient, and MCL 168.639(2) directs the committee to determine whether the proposed date conflicts with other election dates and, if it does not, to approve the proposed date. With respect to a writ of mandamus, a plaintiff must show a clear legal right to have the specific duty performed, a clear legal duty to perform the act on the defendant's part, and that the act to be performed is ministerial "'where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the

exercise of discretion or judgment.'" *Delly v State Lottery*, 183 Mich App 258, 261; 454 NW2d 141 (1990), quoting *Carlson v City of Troy,* 90 Mich App 543, 547; 282 NW2d 387 (1979), quoting *Toan v McGinn,* 271 Mich 28, 34; 260 NW 108 (1935).

"[A] clear legal right' is one 'clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided.'" *University Medical Affiliates v Wayne Co Executive,* 142 Mich App 135, 143; 369 NW2d 277 (1985), quoting 55 CJS, Mandamus, § 53, p 93. In the instant case, assuming plaintiffs submitted sufficient petitions, MCL 168.963(2) and MCL 168.639(2) set forth the specific duties to be performed on plaintiffs' behalf, and mandated their performance. Moreover, because of the mandate, there was no room for discretion. Thus, assuming plaintiffs' petitions were sufficient, they could establish entitlement to a writ of mandamus. *Delly, supra* at 261. Plaintiffs' petitions would be sufficient if they contained the requisite number of valid signatures pursuant to MCL 168.955, and otherwise complied with election laws.

Summary disposition is appropriate only if no factual development could provide a basis for recovery. *Mollett v City of Taylor,* 197 Mich App 328, 332-333; 494 NW2d 832 (1992). Here, intervenors were granted leave to assert as an affirmative defense against plaintiffs, and add as a cross claim against defendants, that numerous signatures were improperly *validated,* and plaintiffs claimed numerous other instances of improperly invalidated signatures, which were not raised in the summary disposition motion. Because issues of fact remained with respect to intervenors' and plaintiffs' challenges, it was improper to grant summary disposition to either party. *Mollett, supra* at 332-333.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Donald S. Owens