

STATE OF MICHIGAN
COURT OF APPEALS

MAUREEN D. TAYLOR,
Plaintiff-Appellee,

v

JACKIE CURRIE and the DETROIT ELECTION
COMMISSION,

Defendants-Appellants,
and

MARINO TAYLOR,
Defendant.

FOR PUBLICATION
October 25, 2007
9:00 a.m.

Nos. 269684
Wayne Circuit Court
LC No. 05-524513-AW

MAUREEN D. TAYLOR,
Plaintiff-Appellee,

v

JACKIE CURRIE, DETROIT CITY CLERK, and
the DETROIT ELECTION COMMISSION,

Defendants-Appellants,
and

MARINO TAYLOR,
Defendant.

No. 271559
Wayne Circuit Court
LC No. 05-524513-AW

Official Reported Version

Before: Smolenski, P.J., and Whitbeck, C.J., and Kelly, J.

SMOLENSKI, P.J. (*concurring in part and dissenting in part*).

I concur fully with parts III through V of the majority opinion. However, I do not agree that MCL 168.759 implicitly prohibits clerks from mailing unsolicited applications for absent voter ballots and would not address whether the Detroit City Clerk has the inherent authority to make such a mailing. Because I conclude that the trial court entered the order enjoining the mailings solely on the basis of an erroneous interpretation of MCL 168.759, I would vacate the permanent injunction. Therefore, I respectfully dissent from the analysis in part II of the majority opinion and the decision to affirm the permanent injunction.

This Court reviews a trial court's decision to grant injunctive relief for an abuse of discretion. *Michigan Coalition of State Employee Unions v Civil Service Comm*, 465 Mich 212, 217; 634 NW2d 692 (2001). Where a trial court's decision to grant injunctive relief is based on a misapprehension of the law, an abuse of discretion occurs. *Bynum v ESAB Group, Inc*, 467 Mich 280, 283; 651 NW2d 383 (2002).

MCL 168.759 does not explicitly prohibit a city clerk from mailing unsolicited absent voter ballot applications in a mass mailing. Nevertheless, the trial court determined that MCL 168.759 impliedly barred defendants from sending unsolicited applications for absent voter ballots. In reaching this conclusion, the trial court relied heavily on an application of the maxim *expressio unius est exclusio alterius* to subsections 1 through 3 and 5 of MCL 168.759. However, the proper application of that maxim to those subsections does not result in the conclusion that the Legislature clearly intended to prohibit the unsolicited mailing of applications for an absent voter ballot to the electorate.

The maxim *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another—is a rule of statutory construction that is the product of logic and common sense. *Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 362; 459 NW2d 279 (1990) (opinion by RILEY, C.J.). The maxim "expresses the learning of common experience that when people say one thing they do not mean something else." *Id.*, quoting 2A Sands, Sutherland Statutory Construction (4th ed), § 47.24, p 203. Thus, "when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Christensen v Harris Co*, 529 US 576, 583; 120 S Ct 1655; 146 L Ed 2d 621 (2000) (citation omitted). However, because this rule of construction infers legislative intent from silence, see *Burns v United States*, 501 US 129, 136; 111 S Ct 2182; 115 L Ed 2d 123 (1991), courts must be careful in their application of the maxim. As Justice Souter warned in his dissent in *Custis v United States*, 511 US 485, 501-502; 114 S Ct 1732; 128 L Ed 2d 517 (1994):

While "often a valuable servant," the maxim that the inclusion of something negatively implies the exclusion of everything else (*expressio unius*, etc.) is "a dangerous master to follow in the construction of statutes." *Ford v. United States*, 273 U.S. 593, 612, 47 S. Ct. 531, 71 L. Ed. 793 (1927) (internal quotation marks and citation omitted). It rests on the assumption that all omissions in legislative drafting are deliberate, an assumption we know to be false. See Posner, Statutory Interpretation--in the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 813 (1983); Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 873-874 (1930). As a result, "scholars have long savaged the *expressio* canon," *Cheney R. Co. v ICC*, 284 U.S. App. D.C. 101, 902 F.2d 66,

68 (CADC 1990) (Williams, J.), at least when it is made to do the work of a conclusive presumption, and our decisions support the proposition that "sometimes [the canon] applies and sometimes it does not, and whether it does or does not depends largely on context." R. Dickerson, *Interpretation and Application of Statutes* 47 (1975); see also *id.*, at 234-235.

The maxim only properly applies "when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite and contrary treatment." *Ford, supra* at 611.

MCL 168.759(1) provides that an elector "may apply for an absent voter ballot" during a specified period before a primary or an election and MCL 168.759(2) requires the elector to "apply in person or by mail with the clerk of the township, city, or village in which the elector is registered." Hence, under the plain language of these two statutory provisions, an elector may only request an absent voter *ballot* during the specified period and must request the *ballot* by mail or in person. These sections do not address the time within which, or the manner by which, an elector may obtain an *application* for an absent voter ballot. Because these two sections deal with the procedures for requesting an absent voter ballot rather than the procedures for requesting an application for an absent voter ballot, these sections cannot support an implicit limitation on the distribution of applications for absent voter ballots. *Christensen, supra* at 583.

Likewise, MCL 168.759(3) cannot be read to limit the manner by which *applications* for an absent voter ballot are distributed. This section provides:

An application for an absent voter ballot under this section may be made in any of the following ways:

- (a) By a written request signed by the voter stating the statutory grounds for making the application.
- (b) On an absent voter ballot application form provided for that purpose by the clerk of the city, township, or village.
- (c) On a federal postcard application.

Although this section refers to an "application for an absent voter ballot," it is clear from the context that the section deals with the manner by which a voter may request an *absent voter ballot*.¹ In order to properly request an absent voter ballot, as opposed to an application for an absent voter ballot, an elector must request the *absent voter ballot* during the requisite period by

¹ Hence, the initial reference to an "application for an absent voter ballot" under MCL 168.759(3) must be understood in this context. That is, the application process must be distinguished from the "application form" that is provided by the clerk.

mail or in person, see MCL 168.759(1) and (2), and may do so: (1) by a written request signed by the voter stating the statutory grounds for making the application, or (2) on an absent voter ballot application form provided for that purpose by the clerk of the city, township, or village, or (3) on a federal postcard application, MCL 168.759(3)(a) to (c). As was true with §§ 759(1) and (2), because § 759(3) applies to the manner by which an elector may request an *absent voter ballot*, rather than the manner by which an elector may request an *application* for an absent voter ballot, application of the maxim to § 759(3) does not support an implicit limitation of the manner by which applications for an absent voter ballot may be distributed. At most, application of the maxim results in the conclusion that a voter who wishes to receive an absent voter ballot may only make the request for a absent voter ballot in one of the three enumerated ways. *Christensen, supra* at 583.

MCL 168.759(5) provides, in relevant part, that "[t]he clerk of the city, township, or village shall have absent voter ballot application forms available in the office of the clerk at all times and shall furnish an absent voter ballot application form to anyone upon a verbal or written request." Section 759(5) establishes two duties for clerks. First, the clerk must have applications for absent voter ballots available in the clerk's office at all times. Second, the clerk has a duty to provide an application to anyone upon verbal or written request. Although the section clearly addresses the distribution of *applications* for absent voter ballots, application of the maxim does not support an inference that a clerk may not distribute applications except upon the verbal or written request of a person. Rather, the reasonable inference to be drawn from application of the maxim is that a clerk is only *required* to distribute applications when a person makes a verbal or written request. That is, the clerk is *not required* to distribute applications under any other circumstances. There simply is no contrast from which one might infer that the Legislature, by its silence, intended to prohibit clerks from providing applications for absent voter ballots to persons without an oral or written request.² *Ford, supra* at 611. To conclude otherwise would be to judicially amend MCL 168.759(5) to read that city, township, or village clerks "shall *only* furnish an absent voter ballot application form" to a person on verbal or written request. Whether to limit the distribution of applications in this way is a decision better left to the legislative process.

Finally, because the trial court did not rely on the clerk's lack of inherent authority as a basis for exercising its discretion to grant the permanent injunction, whether the trial court could have properly entered a permanent injunction against the mailing of unsolicited applications for absent voter ballots on that basis is not properly before this Court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). For this reason, I would express no opinion regarding whether the Detroit City Clerk has the inherent authority to mail unsolicited applications for absent voter ballots.

² This is in stark contrast to MCL 168.759(7), which clearly contemplates that any "person" may print and distribute absent voter ballot applications.

Because the trial court based its decision to permanently enjoin the mailing on a misapprehension of law, the trial court abused its discretion. *Bynum, supra* at 283. Therefore, I would vacate the permanent injunction. In all other respects, I concur with the majority.

/s/ Michael R. Smolenski