STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER P. MARTIN, ANNA MCCOY, RICHARD M. HARRIS, and J. RICHARD ERNST,

Plaintiffs-Appellees,

v

SECRETARY OF STATE, DIRECTOR OF THE BUREAU OF ELECTIONS, and BOARD OF STATE CANVASSERS,

Defendants-Appellees

and

WILLIAM F. MYLES and RONALD M. BERGERON,

Appellants.

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No. 286015
Ingham Circuit Court
LC No. 08-000752-PZ

Advance Sheets Version

Before: O'Connell, P.J., and Owens and Borrello, JJ.

BORRELLO, J.

Appellants, 23rd Circuit Court Judges William F. Myles and Ronald M. Bergeron, appeal the trial court's June 10, 2008, injunction, by which the trial court ordered the Secretary of State to accept additional nominating petition signatures on behalf of plaintiff Christopher P. Martin until 4:00 p.m. on June 12, 2008, and to place Martin on the ballot as a candidate for judge of the 23rd Circuit Court if he filed sufficient valid signatures by that deadline. We affirm.

I. Facts and Procedural History

The facts giving rise to this appeal are not in dispute. Martin sought to run for the office of judge of the 23rd Circuit Court. MCL 168.413 establishes the requirements for nominating petitions for candidates for circuit court judges:

> To obtain the printing of the name of a person as a candidate for nomination for the office of judge of the circuit court upon the official nonpartisan primary ballots, there shall be filed with the secretary of state nominating petitions containing the signatures, addresses, and dates of signing of a number of qualified and registered electors residing in the judicial circuit as determined under section [MCL 168.544f] . . . . The secretary of state shall receive the nominating petitioners up to 4 p.m. of the fourteenth Tuesday preceding the primary.

MCL 168.544f imposes a graduated scale for the number of signatures required on the nominating petitions that is based on the population of the district. Before April 1, 2003, the 23rd Judicial Circuit was made up of Iosco and Oscoda counties and included one judge. 2002 PA 92 amended MCL 600.524 by restructuring the 23rd Judicial Circuit to include Alcona, Arenac, Iosco, and Oscoda counties and add one judge. With the additional counties, the 23rd Judicial Circuit has an estimated population of 65,745. Under MCL 168.544f, the minimum number of signatures required on a nominating petition for an individual seeking to be a judicial candidate for the 23rd Judicial Circuit is 200, and the maximum number of signatures on the nominating petition is 400.

MCL 600.550(1) requires the State Court Administrator's Office (SCAO) to notify the Bureau of Elections "with respect to each new circuit judgeship authorized pursuant to this subsection." This notice requirement is triggered when the county board of commissioners of each affected county approves the creation of the judgeship by resolution and files a copy of the resolution with SCAO. MCL 600.550(1). However, MCL 600.550a(4) eliminated the requirement of approval by the county board of commissioners for certain judicial circuits that were restructured, including the 23rd Judicial Circuit, thus rendering virtually inoperable SCAO's notification obligation under MCL 600.550(1). The Bureau of Elections, which publishes signature requirements, was thus not notified of the change in the 23rd Judicial Circuit, and it provided erroneous information about the signature requirement for candidates seeking a judgeship in the 23rd Judicial Circuit, indicating that it was 100 to 200 signatures rather than the 200 to 400 signatures required by MCL 168.544f. The Secretary of State published this erroneous information, and it appeared on the Secretary of State's website.

According to affidavits submitted by Martin, he or individuals associated with his campaign made at least two calls to the Secretary of State in April 2008 to verify the number of signatures necessary to get his name on the ballot for the position of judge of the 23rd Judicial Circuit, and on both occasions the Secretary of State informed them that Martin needed to submit between 100 to 200 signatures and that submission of more than 200 signatures was a crime. In addition, a document entitled "Filing Requirements for Non-Incumbent Judicial Candidates" contained the same inaccurate information regarding the number of signatures required for the 23rd Judicial Circuit. In his affidavit, Christopher M. Thomas, Director of the Bureau of Elections, asserted that "[t]his publication has been posted on the Department of State's website and sent directly to candidates."[1] Relying on the Secretary of State's erroneous information regarding the number of signatures required, Martin filed 158 signatures with the Bureau of

[1] It is unclear from the record if the Bureau of Elections sent Martin this document, but Martin asserts in his affidavit that he viewed the document on the Bureau of Elections' website.

Elections on April 23, 2008. On May 1, 2008, after the April 29, 2008, deadline for gathering signatures and filing petitions had passed, Bergeron filed a challenge to Martin's eligibility to have his name placed on the ballot, arguing that Martin's petitions had an insufficient number of signatures and therefore failed to comply with MCL 168.544f. On May 5, 2008, Martin attempted to submit 208 additional signatures, but the Bureau of Elections refused to accept the signatures because the deadline had passed. On May 15, 2008, the Bureau of Elections sent Martin a letter informing him that he was ineligible to have his name listed as a candidate on the primary ballot because his petition contained less than 200 signatures and was therefore insufficient on its face.

Plaintiffs filed this action in the circuit court on May 30, 2008, against the Secretary of State, the Director of the Bureau of Elections, and the Board of State Canvassers, requesting a temporary restraining order, a preliminary injunction, and, after a final hearing, a permanent injunction enjoining the Secretary of State from excluding Martin from the ballot. Plaintiffs also sought orders of mandamus against the Board of State Canvassers and the Secretary of State and alleged violations of plaintiffs' First Amendment rights and the due process clauses of the United States and Michigan constitutions, negligent misrepresentation, promissory estoppel, and entrapment by estoppel. A hearing was set for June 10, 2008. On June 9, 2008, appellants filed an emergency motion to intervene, arguing that they had "an obvious interest in whether an otherwise uncontested election becomes a contested election, by virtue of the relief Martin requests in this lawsuit."

At the June 10, 2008, hearing, the trial court considered appellants' motion to intervene, as well as plaintiffs' complaint. Appellants asserted that they were entitled to intervene under MCR 2.209(A)(3) and contended that their interests would not necessarily be protected by the existing defendants, noting that the Secretary of State had indicated that it would not appeal a ruling that was contrary to appellants' interests. Defendants did not object to appellants' attempt to intervene in the matter. However, plaintiffs asserted that appellants' motion to intervene was untimely. Plaintiffs also argued that appellants had failed to demonstrate that they would not be adequately represented by the existing defendants, observing that the Attorney General had undertaken an aggressive defense of the matter and had filed an extensive brief. The trial court denied the motion to intervene, stating that appellants did not have standing to intervene because the litigation involved whether the court "should issue a writ of mandamus against the Secretary of State. It is not directed at [appellants.]" In an order dated June 25, 2008,[2] the trial court stated: "Incumbents' Motion to Intervene is denied because the Incumbents have not satisfied the requirements set forth in MCR 2.209(A)(3) for the reasons discussed on the record." The trial court further ordered the Secretary of State to extend the deadline for filing nominating

[2] We note that the court did not enter the order denying the motion to intervene until June 25, 2008, after appellants filed the claim of appeal. While appellants have provided this Court with that order as a supplement to their claim of appeal, they did not apply for leave to appeal that order or move this Court to amend the appeal. However, given the nature of the case, the time constraints placed on this Court, and the lack of argument from appellees on this issue, we exercise our discretion to treat appellants' claim of appeal as an application for leave to appeal, and we grant it. See *In re Investigative Subpoena re Homicide of Lance C Morton*, 258 Mich App 507, 508 n 2; 671 NW2d 570 (2003).

petition signatures until 4:00 p.m. on June 12, 2008, and if sufficient signatures were filed, to place Martin's name on the ballot. Thereafter, Martin acquired sufficient signatures, and the Secretary of State placed his name on the November 4, 2008, ballot for the position of judge of the 23rd Circuit Court.

Appellants filed their claim of appeal on June 17, 2008, along with motions to expedite, to waive the requirements of MCR 7.209, for immediate consideration, for peremptory reversal, and for a stay. In a June 20, 2008, order, this Court granted immediate consideration and appellants' motion to waive the requirements of MCR 7.209, but denied peremptory reversal or a stay. In a June 27, 2008, order, this Court granted the motion to expedite and directed the parties to address whether appellants are aggrieved parties within the meaning of MCR 7.203(A). Shortly thereafter, appellants filed a bypass application for leave to appeal in the Michigan Supreme Court. In an order dated July 9, 2008, our Supreme Court denied the application, but ordered this Court to issue a decision in this case no later than August 21, 2008.

II. Analysis

We first address whether appellants meet the definition of "aggrieved party" under MCR 7.203(A). The concepts of standing and whether an individual is an aggrieved party are closely related. See *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 290-291; 715 NW2d 846 (2006). Whether a party has standing is a question of law, which we review de novo. *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 734; 629 NW2d 900 (2001). "In order to have appellate standing, the party filing an appeal must be 'aggrieved.'" *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008); see *Federated Ins Co*, 475 Mich at 290-291; MCR 7.203(A).

This court "has jurisdiction of an appeal of right filed by an *aggrieved party* from" a final order or judgment of the trial court. MCR 7.203(A) (emphasis added). In *Federated Ins Co*, the Supreme Court clarified the requirements for a party to be an aggrieved party under MCR 7.203(A):

> "To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency." *In re Estate of Trankla*, 321 Mich 478, 482; 32 NW2d 715 (1948), citing *In re Estate of Matt Miller*, 274 Mich 190, 194; 264 NW 338 (1936). An aggrieved party is not one who is merely disappointed over a certain result. Rather, to have standing on appeal, a litigant must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power. The only difference is a litigant on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case. [*Federated Ins Co*, 475 Mich at 291-292.]

The Supreme Court's holding in *Federated Ins Co* regarding who is an aggrieved party under MCR 7.203(A) heightened the requirements to be an aggrieved party, thus rendering it more difficult for a party to invoke the jurisidiction of this Court. Before the Supreme Court decided *Federated Ins Co*, a litigant was an aggrieved party if the party's legal right was invaded by an action or the party's pecuniary interest was directly or adversely affected by a judgment or

order. See *In re Critchell Estate*, 361 Mich 432, 448-449; 105 NW2d 417 (1960); *In re Freeman Estate*, 218 Mich App 151, 155; 553 NW2d 664 (1996). It was sufficient if a party had "an interest in the subject matter of the litigation." *In re Critchell Estate*, 361 Mich at 448; see also *In re Freeman Estate*, 218 Mich App at 155. After *Federated Ins Co*, to be "aggrieved," a party must have more than a mere interest in the subject matter of the proceedings below; the party "must have suffered a concrete and particularized injury . . . ." *Federated Ins Co*, 475 Mich at 291. A "minute and generalized" injury is not concrete and particularized. *Rohde v Ann Arbor Pub Schools*, 479 Mich 336, 354; 737 NW2d 158 (2007).

Appellants argue that they have suffered a concrete and particularized injury because they must endure a contested judicial election with an opponent who has not met the statutory requirements to properly be on the ballot and this will require them to make significant financial expenditures. Clearly, appellants, as incumbent judges, have an interest in the subject matter of the litigation, because the results of such litigation would determine whether they run unopposed in the November 2008 election or face a challenger. However, we are unwilling to conclude as a matter of law that a candidate for elected office is an aggrieved party solely by virtue of being required to run for elected office in a contested election. In support of our conclusion in this regard, we note that we have previously recognized that "the definition of 'aggrieved party' varies according to the type of case at issue, and, consequently, the court must in each case examine the subject matter of the litigation." *Security Ins Co of Hartford v Daniels*, 70 Mich App 100, 105; 245 NW2d 418 (1976). The subject matter of the instant case concerns an attempt by appellants, as incumbent judges, to keep a potential challenger off the ballot. This Court has recognized that

> "[t]here is a fundamental difference between actions taken to get a candidate's name on the ballot and actions taken to prevent it from appearing. Associating for the purpose of getting a candidate's name or a legislative proposal on the ballot is protected activity under the First Amendment; conspiring for the purpose of having it removed is not." [*Deleeuw v Bd of State Canvassers*, 263 Mich App 497, 504; 688 NW2d 847 (2004).]

While we certainly do not believe that appellants conspired to have Martin's name removed from the ballot, their attempt to bar Martin from appearing on the ballot is the subject matter of the litigation. We decline to hold as a matter of law that a candidate for elective office is an aggrieved party by virtue of facing a contested election for that office when the nature of the litigation involves the candidate's attempt to bar a potential challenger from appearing on the ballot. We acknowledge that our holding in this regard effectively denies appellants access to the courts. While we would not be inclined to close the courthouse doors in this manner to a party who was seeking to get a candidate's name on the ballot, we do not so zealously protect parties who seek to prevent a candidate's name from appearing on the ballot. In this case, appellants are understandably disappointed about the fact that Martin's appearance on the ballot will require them to engage in a considerably more difficult and more expensive contested election rather than run unopposed for the judicial seats they seek. However, a party who is merely disappointed over a result is not an aggrieved party. *Federated Ins Co*, 475 Mich at 291.

Even if we were inclined to conclude that appellants are aggrieved parties under MCR 7.203(A), however, appellants have not satisfied the requirement of a concrete and particularized

injury established by the Supreme Court in *Federated Ins Co*, 475 Mich at 291. At most, appellants have established the possibility of being faced with uncertain and unspecified expenditures as a result of campaigning in a contested election. According to appellants, Martin's name on the ballot "inevitably will put [appellants] to significant expense." Even if this is true, such undefined significant expenses do not constitute a concrete and particularized injury under *Federated Ins Co* because appellants have not specified, articulated or explained the nature of the significant expenses (whether such expenses would be necessary for television or radio advertisement, signs or brochures, or some other expenses) or the amount of those expenses. We conclude that any injury to appellants in this case is uncertain and unparticularized; therefore, appellants have failed to establish a concrete and particularized injury, as required by *Federated Ins Co*.

Appellants have not cited any caselaw from Michigan or another jurisdiction in which a court has held that being a candidate in a contested election for public office renders an individual an aggrieved party. In support of their argument that they will suffer an injury if they are forced to make financial expenditures[3] to engage in a contested election, appellants rely on two federal cases: *Daggett v Comm on Governmental Ethics & Election Practices*, 172 F3d 104, 108 (CA 1, 1999), and *Marshall v Meadows*, 921 F Supp 1490 (ED Va, 1996). We conclude that these cases are distinguishable from this case in that neither federal case decides whether a person is an aggrieved party under MCR 7.203(A) or a similar statute or court rule and neither case holds that an incumbent elected official suffers a concrete and particularized injury by virtue of having to make financial expenditures to campaign in a contested election. Thus, we are not persuaded by appellants' reliance on these cases.

Appellants also argue that as citizens they have standing to ensure that the elections laws of the state of Michigan are properly enforced and that they are aggrieved parties if they are denied the opportunity to ensure that such laws are enforced. In support of this contention, appellants rely primarily on this Court's decision in *Deleeuw*. In *Deleeuw*, Republican Party operatives, including plaintiff Deleeuw, were seeking to place Ralph Nader's name on the Michigan ballot for President of the United States in the November 2004 election. We ruled that the plaintiffs had standing in that action because they had circulated, signed, and filed the nominating petitions on behalf of Ralph Nader, thereby giving them a legally protected interest for this Court to enforce. In so ruling, we opined:

> Normally, courts require citizens to resort to the election process to vent any frustration. Election cases are special, however, because without the process of elections, citizens lack their ordinary recourse. For this reason we have found that ordinary citizens have standing to enforce the law in election cases. Moreover, we are not dealing with ordinary citizens here. Collectively, plaintiffs duly circulated, signed, and filed petitions that the board would now mute by its inaction. Under these circumstances, plaintiffs possessed a legally protected interest in having their valid signatures effectuate their petition to qualify the

[3] We note that appellants have not provided any documentation to demonstrate that they have expended any funds on behalf of their reelection campaigns, nor is there any mandate that they do so.

named political candidate as mandated by law. [*Deleeuw*, 263 Mich App at 505-506 (citations omitted).]

If there was any question, in *Deleeuw* we clarified that questions of standing in election cases must be considered using the standing principles outlined in *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004). In *Nat'l Wildlife*, Justice Markman, writing for the majority, stated:

> At a minimum, standing consists of three elements:
>
> "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" [*Id.* at 628-629 (citation omitted).]

As we have observed previously in this opinion, the concepts of standing and aggrieved party are intertwined. For the same reasons that appellants did not establish that they suffered a concrete and particularized injury that rendered them aggrieved parties under MCR 7.203(A), we also conclude that they have failed to establish the first element in the standing analysis. Appellants have not suffered a legally cognizable injury by virtue of being forced to run in a contested judicial election. Additionally, we note that there is a significant factual distinction between this case and *Deleeuw*. In this case, appellants are attempting to prevent a candidate from appearing on the ballot, whereas in *Deleeuw* the plaintiffs were attempting to get an individual's name on the ballot. As this Court sagely observed in *Deleeuw*, this difference is critical: "There is a fundamental difference between actions taken to get a candidate's name on the ballot and actions taken to prevent it from appearing." *Deleeuw*, 263 Mich App at 504. In sum, *Deleeuw* stands for the proposition that the interests of the public are better served by having the names of candidates placed on the ballot rather than by removing them.

III. Conclusion

We share and agree with the concerns raised by the dissent that citizens possess the right to redress grievances involving elections through our courts. We emphasize that nothing in this opinion should be construed to limit citizens' access to our courts to ensure that the election laws of this state are enforced. Rather, our opinion must be narrowly construed and limited to the unique facts of this case. This narrow holding stands solely for the conclusion that pursuant to the dictates set forth by our Supreme Court in *Federated Ins Co* and *Nat'l Wildlife*, a candidate for judicial office has not suffered an injury and therefore is not an aggrieved party and does not have standing solely because the candidate is required to run in a contested judicial election. Because we conclude that appellants are not aggrieved parties under MCR 7.203(A) and have failed to articulate a legally cognizable right granting them standing in this matter, we need not address any additional arguments advanced by the parties.

Affirmed. No costs, a public question having been involved.

Owens, J., concurred.

/s/ Stephen L. Borrello
/s/ Donald S. Owens