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.

FOR PUBLICATION
August 21, 2008

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

Advance Sheets Version

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

O'CONNELL, P.J. (*dissenting*).

The majority concludes that appellants are not aggrieved parties and, therefore, lack standing as Michigan citizens to intervene in the underlying election dispute in this case. I respectfully disagree. I believe that appellants were wrongfully denied their opportunity to intervene in this case, both in their capacities as private citizens and as candidates for public office. By concluding otherwise, the majority has essentially determined that Michigan citizens do not automatically have standing to ensure that the election laws of this state are properly enforced. Further, although the majority did not address the issue, I also conclude that the trial court erred when it ordered the Secretary of State to extend the filing deadline to give plaintiff Christopher P. Martin the opportunity to file additional nominating petition signatures and to

allow his name to appear on the ballot. I would vacate the trial court's order and affirm the decision of the Secretary of State.[1]

First, I disagree with the trial court's conclusion that appellants were not aggrieved parties and, therefore, lacked standing to intervene in this case. In a confusing decision, the trial court concluded that appellants attempted to intervene because they would have to campaign in a contested election if Martin was placed on the ballot, but appellants were not aggrieved parties and their status as judicial candidates was insufficient to confer standing. The majority agrees. I do not. The trial court's conclusion that a person running for public office does not have an interest in the election or is not an aggrieved party in litigation designed to add or subtract names from the ballot is clearly erroneous. I can think of no greater aggravation as an incumbent candidate than running in a contested election and risking the loss of a job. Further, the contested or uncontested nature of an election affects the manner in which the candidate runs his campaign and affects the amount of time and money that a candidate must invest in order to run a successful campaign. If a campaign is contested, it is axiomatic that a candidate will need to spend more time and money on the election (preparing mailings and yard signs, making speeches, etc.), not only to make his candidacy more widely known, but also to highlight the differences between himself and his opponent and showcase the reasons why voters should elect him instead of his opponent. In my opinion, the proper application of the election laws at issue will affect appellants' job security and the nature of the campaigns they must run. Clearly, appellants are aggrieved parties.

In addition, the trial court incorrectly focused solely on appellants' status as judicial candidates and completely disregarded their status as voters in the district with a direct interest in the proper application of the election laws being upheld. Plaintiffs argue that appellants' status as voters is irrelevant because they have suffered no harm that the general public did not suffer. However, this Court has recognized that "[e]lection cases are special . . . because without the process of elections, citizens lack their ordinary recourse." *Deleeuw v Bd of State Canvassers*, 263 Mich App 497, 505–506; 688 NW2d 847 (2004). Because the improper implementation of election laws affects the process by which citizens normally exercise their collective voice to uphold the status quo or effectuate change, "ordinary citizens have standing to enforce the law in election cases."[2] *Id.* at 506. See also *Helmkamp v Livonia City Council*, 160 Mich App 442, 445; 408 NW2d 470 (1987) (holding that the plaintiffs in an election case "were not required to show a substantial injury distinct from that suffered by the public in general"). "[T]he right to vote is an implicit '"fundamental political right"' that is '"preservative of all rights."' *In re*

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[1] I concur with the majority opinion that appellants filed an appeal as of right and that their claim should have been filed as an application for leave to file their appeal. However, because of the time constraints, and for the sake of judicial economy, we have exercised our discretion to treat appellants' claim of appeal as an application for leave to appeal and have granted it. See *In re Investigative Subpoena re Homicide of Lance C Morton*, 258 Mich App 507, 508 n 2; 671 NW2d 570 (2003).

[2] It is undisputed that appellants are not only candidates for election to the 23rd Circuit Court, but are also voters and ordinary citizens.

Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 479 Mich 1, 16; 740 NW2d 444 (2007) (citation omitted). Further, the Legislature has the power and responsibility to "preserve the purity of elections" and "guard against abuses of the elective franchise . . . ." Const 1963, art 2, § 4. Given that this case concerns a trial court's application of equity to enter an injunction that permits an end run around election laws, appellants, in their capacity as ordinary citizens and voters, have suffered an injury and have standing to bring their claim to remedy this injury. *Helmkamp*, *supra* at 445. Having suffered an injury as a result of the trial court's actions, appellants are aggrieved parties.[3] *Manuel v Gill*, 481 Mich 637, 643-644; 753 NW2d 48 (2008).

The majority opinion, knowingly or unknowingly, creates two classes of citizens who may bring lawsuits to enforce Michigan's election laws. The first consists of those who want to bring a lawsuit to enforce Michigan's election laws in order to place a candidate's name on the ballot. The second consists of those who want to bring a lawsuit to enforce Michigan's election laws in order to deny a candidate a position on the ballot. Both classes of citizens have the same goal, i.e., to see that Michigan's election laws are properly administered. Remarkably, the majority opinion grants standing to one class and denies standing to the other. The majority claims that this Court's opinion in *Deleeuw*, supports its position, but the distinction that the majority makes in this case is not found in *Deleeuw*. Although *Deleeuw* addresses the issue of standing, it does not do so in a context similar to that found in this case. *Deleeuw*, *supra* at 502-507. Rather, the *Deleeuw* Court determined that a party who was not formally affiliated with an election campaign, yet was collecting signatures to get a candidate's name on the ballot, had standing pursuant to MCL 168.590(3) to seek a mandamus action asking this Court to compel the Board of State Canvassers to certify the petition to place the candidate on the ballot. *Id.* at 503.

Granted, the *Deleeuw* Court noted that "[a]ssociating 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." *Id.* at 504. However, this case involves neither allegations of associating to place a candidate's name on the ballot nor conspiring to take it off. Rather, this case commenced because plaintiffs wanted to place Martin's name on the ballot for election to the 23rd Circuit Court, and appellants sought to intervene to ensure that election laws were properly followed. Therefore, I do not believe that *Deleeuw* supports the majority's conclusion that a citizen's standing in an election case varies depending on whether his substantive argument in support of the proper application of an election law would result in a candidate being placed on or taken off the ballot. Conversely, I conclude that all parties to this litigation have standing to ensure that the elections laws of the state of Michigan are properly enforced. To rule otherwise would discriminate against an entire class of citizens attempting to enforce our election laws.

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[3] I note that MCR 7.203(B), which provides for jurisdiction for appeal by leave, does not include the "aggrieved party" language found in MCR 7.203(A). Thus, under a strict interpretation of the court rule, it would appear that status as an aggrieved party is not required for an appeal by leave. However, because our Supreme Court has ruled that appellate standing requires one to be aggrieved, *Manuel*, *supra* at 643-644, we must address this issue.

Because the trial court determined that appellants were not aggrieved parties and did not permit them to intervene in this case, it did not consider any substantive arguments by appellants questioning the merits and propriety of its action when it decided that equity dictated permitting Martin to submit additional nominating signatures in order to be placed on the ballot as a candidate. However, because appellants should have been permitted to intervene, the trial court erred when it failed to give them a voice in this proceeding. For this reason, the trial court should have permitted appellants to intervene and should have considered appellants' arguments before ruling on substantive issues regarding whether to give Martin a chance to appear on the ballot.

Notably, the majority does not address whether the trial court erred when it determined that equity dictated giving Martin the chance to appear on the ballot. Presumably, the majority determined that its conclusion that appellants lacked standing meant that it did not need to address the trial court's substantive ruling. However, because I have concluded that appellants have standing and should have been permitted to intervene in this case, and because the majority's affirmation of the trial court's decision to the contrary means that a situation will not occur in which the trial court could revisit its decision to give Martin an opportunity to appear on the ballot, I believe that it is necessary to address appellants' argument that the trial court's ultimate decision in this case, a decision in which appellants were improperly denied a voice, was erroneous.

MCL 168.544f provides a chart detailing the number of signatures required depending on the population of the district in the last federal census and whether the petition is partisan, nonpartisan, or qualifying. The 23rd Judicial District is made up of Alcona, Arenac, Iosco, and Oscoda counties. Their respective populations in the 2000 census were 11,719, 17,269, 27,339, and 9,418 individuals, resulting in a total population of 65,745. For a population between 50,000 and 74,999, 200 to 400 signatures are required for a nonpartisan petition. MCL 168.544f. Because Martin submitted his petition with only 158 signatures, it was insufficient to place him on the ballot.

Plaintiffs argue that Martin was placed in a Catch-22 because he had received an instruction from the Secretary of State indicating that he should file his petition with 100 to 200 signatures and was required to follow that instruction pursuant to MCL 168.931(1)(h). Thus, he either had to ignore the instruction and be subject to misdemeanor prosecution or ignore MCL 168.544f and risk not being placed on the ballot. I disagree with plaintiffs' claim of forced duality. Even under the erroneous instruction, Martin was permitted to submit a maximum of 200 signatures. Had he done so, he would have met the minimum number of signatures necessary under the proper calculation. Thus, he could have complied with both the instruction and the proper statutory calculation.

However, moving beyond the simple math, MCL 168.931(1)(h) required Martin to "not wilfully . . . disobey a lawful instruction or order of the secretary of state . . . ." Because the instruction requiring the submission of 100 to 200 signatures was contrary to the clear language of MCL 168.544f, it was not a lawful instruction, and Martin was not required to follow it. Had Martin taken the time to calculate the correct number of signatures required under MCL 168.544f, he would have been able to conclude that the instruction from the Secretary of State was erroneous and, therefore, need not be followed. If Martin had truly felt forced under

these circumstances,[4] he should have called the discrepancy to the attention of the Secretary of State and filed the number of signatures he thought appropriate. Contrary to plaintiffs' assertions, this would not have been unlawful behavior. Under MCL 168.548, it is unlawful to "wilfully and intentionally procure more signatures upon nominating petitions than the maximum number prescribed in this act." Had Martin explained that his calculation required the submission of 200 to 400 signatures under MCL 168.544f, then his submission would not have been unlawful under MCL 168.548 because it would not have been a willful and intentional submission of signatures over the maximum amount, but a willful and intentional attempt to comply with the statutory requirements.

Plaintiffs argue that Martin "relied on the instructions and verbal confirmations and presumed that they were correct." This argument reads as an estoppel argument, and I will treat it as such. I do not believe that estoppel is available, because caselaw only refers to estoppel against a *local unit of* government, see *Parker v West Bloomfield Twp*, 60 Mich App 583, 591; 231 NW2d 424 (1975), and defendants are officers of the state of Michigan. However, even assuming that estoppel could be applied in this situation, Martin must show not only good-faith reliance on the defendants' conduct, but also "lack of actual knowledge *or lack of the means of obtaining actual knowledge of the facts in question . . . .*" *Id.* at 592 (emphasis added). Martin had access to the statutes and census information and could have properly calculated the number of signatures needed to appear on the ballot. Therefore, estoppel is not appropriate.

Although I sympathize with Martin, I must conclude that the trial court erred in applying equity in this situation. Equity only applies in the absence of a specific statutory mandate. See *Stokes v Millen Roofing Co*, 466 Mich 660, 672; 649 NW2d 371 (2002). "'[I]t is not [a court's] place to create an equitable remedy for a hardship created by an unambiguous, validly enacted, legislative decree.'" *Id.*, quoting *Stokes v Millen Roofing Co*, 245 Mich App 44, 58; 627 NW2d 16 (2001). This should be particularly true of election law. If this Court were to erode the statutory requirements of election law through the use of equity, we would create ambiguity and inconsistency in what needs to be a uniform and stable area of law. Once one exception is created, the very foundation of our form of government can be questioned and our citizens may lose faith. MCL 168.544f clearly indicated the signature requirements for Martin's judicial nomination petition, and Martin had a duty to follow them.[5] Because he did not submit the required number of signatures by the statutory deadline, he should not have been given an extra opportunity to be placed on the ballot. Holding otherwise invites the destruction of our citizens' faith in our electoral process.

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[4] I say "if" because plaintiffs concede in their brief that Martin was unaware of the higher signature requirement in MCL 168.544f at the time of his filing. Thus, the Catch-22 is merely a theoretical argument constructed after the fact, rather than an actual explanation for Martin's behavior.

[5] At oral argument, claims were made that the statute is difficult to follow. Even if that is the case, difficulty in understanding a statute does not give anyone the right to not follow it. If it did, for example, no one would ever have to pay taxes.

I would vacate the trial court's order and affirm the decision of the Secretary of State.

/s/ Peter D. O'Connell