

**STATE OF MICHIGAN
IN THE COURT OF APPEALS**

CHERYL A. COSTANTINO and
EDWARD P. McCALL, Jr.,

Plaintiffs/Appellants,

COA No. 355443
Case: 20-014780-AW
Hon. Timothy M. Kenny

v.

CITY OF DETROIT; DETROIT ELECTION
COMMISSION; JANICE M. WINFREY, in
her official capacity as the CLERK OF THE CITY
OF DETROIT and the Chairperson of the
DETROIT ELECTION COMMISSION;
CATHY M. GARRETT, in her official
capacity as the CLERK OF WAYNE
COUNTY; and the WAYNE COUNTY BOARD
OF CANVASSERS,

Defendants/Appellees.

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**WAYNE COUNTY'S RESPONSE TO
CONSTANTINO'S MOTION FOR PEREMPTORY REVERSAL
AND MOTION FOR IMMEDIATE CONSIDERATION**

County Appellees oppose the emergency motion for peremptory reversal and motion for immediate consideration. The lower court appropriately determined that there was no fraud, Appellants were not entitled to an audit, and no injunction should issue. County Appellees aver that the outcome of this meritless case should not affect the certification schedule.

I. Standard For A Temporary restraining order/preliminary injunction.

A temporary restraining order may be granted if it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant from the delay required to effect notice or from the risk that notice will itself precipitate adverse action before an order can be issued. MCR 3.310(B)(1)(a).

Appellants cannot meet the elements for an injunction:

- they are likely to prevail on the merits
- there would be harm to the public interest
- they would suffer irreparable harm
- harm to them outweighs any public harm

Michigan State Employees Ass'n v Dep't of Mental Health, 421 Mich 152; 365 NW2d 93 (1984).

II. Appellants are not likely to succeed on the merits

A. The Appellants do not have a right to request an audit separate from that provided by the State of Michigan pursuant to Mich Const art 2 §4 and MCL 168.31a.

Appellants cite Mich Const art 2 §4 for the proposition that they have the right to a special audit of the election. The constitutional provision provides for an audit according to Michigan Election law, i.e. a citizen has “The right to have the results of statewide elections audited, **in such a manner as prescribed by law**, to ensure the accuracy and integrity of elections.” Mich Const art 2 §4(1)(h). (Emphasis added).

MCL 168.31a provides for this audit right:

- (1) In order to ensure compliance with the provisions of this act, after each election the **secretary of state may audit election precincts.**

- (2) The secretary of state shall prescribe the procedures for election audits that include reviewing the documents, ballots, and procedures used during an election as required in section 4 of article II of the state constitution of 1963. The secretary of state and county clerks shall conduct election audits, including statewide election audits, as set forth in the prescribed procedures. The secretary of state shall train and certify county clerks and their staffs for the purpose of conducting election audits of precincts randomly selected by the secretary of state in their counties. An election audit must include an audit of the results of at least 1 race in each precinct selected for an audit. A statewide election audit must include an audit of the results of at least 1 statewide race or statewide ballot question in a precinct selected for an audit. An audit conducted under this section is not a recount and does not change any certified election results. **The secretary of state shall supervise each county clerk in the performance of election audits conducted under this section.**

Thus, the Secretary of state and Wayne County Clerk will conduct post-election audits after the November 4, 2020 election is certified and recounts are performed. The lower court was cognizant of this when it noted that Appellants were requesting that the lower court interpret “in such a manner as prescribed by law” to mean the lower court must fashion a remedy. The lower court rejected such a posture and noted that “Following the adoption of the amended Article 2, §IV, the Michigan Legislature amended MCL 168.31a effective December 28, 2018. MCL 168.31a provides for the Secretary of State and appropriate county clerks to conduct a results audit of at least one race in each audited precinct.” (Exhibit 1, page 10).

B. Appellants cannot request both an injunction and leave for quo warranto.

When it appears that material fraud or error has been committed at any election in such county at which there has been submitted any constitutional amendment, question, or proposition to the electors of the state or county township or municipality, the remedy by quo warranto applies. MCL §600.4545. It is unlikely that a petitioner for an injunction will prevail on the merits – the petitioner has a remedy at law, which is quo warranto and the petitioner will have no harm. *Wayne*

County Republican Committee v Wayne County Board of Commissioners, 70 Mich App 620; 247 Nw2d 571 (1976).

In *Atty General v Ingham Circuit Judge*, 347 Mich 579; 81 NW2d 579 (1957), the Supreme Court of Michigan held that equitable relief may not properly be substituted for a statutory remedy prescribed for the determination of the validity of an election. Where the statutory remedy of quo warranto is available for determining the question of the validity of an election a court of equity may not properly take jurisdiction:

(T)he general rule is that an injunction will not issue to prevent the holding of an election whether or not the election is illegal, and that this is so whether the election relates to the filling of public office or other matters..there is an adequate remedy at law, by quo warranto and that the right involved is a strictly political right which cannot be enforced or protected by a court of equity but is cognizable only by a court of law

Atty General v Ingham Circuit Judge, *id*, at 583.

In *Grand Rapids City Clerk v Judge of Superior Court*, 366 Mich 335; 115 NW2d 112 (1962), plaintiffs asked for a temporary injunction restraining the election. In overturning the lower court's award of an injunction, the Supreme Court said:

Elections are a most vital part of government. The people are more closely involved with their government in elections than in almost any other process Interference by the courts where, as here the proceedings are regular and legal in every respect, should be avoided. Those complaining of the election have a clear and adequate remedy by quo warranto to test the constitutional issue in the event of a favorable vote. (Emphasis supplied).

Grand Rapids City Clerk v Judge of Superior Court, *id* at 340.

See also *Holland City Clerk v Ottawa Circuit Judge*, 368 Mich 479; 118 NW2d 250 (1962) (temporary injunction against holding an election on the question of annexation to the city was improvidently issued); *Edwards v Flint City Clerk*, 9 Mich App 367; 156 NW2d 153 (1968) (Court

of Appels reversed issuance of an injunction to prevent door-to-door registration of elections); *St Joseph Twp v Berrien County Supervisors* 363 Mich 295; 109 NW2d 826 (1961) (Court refused to enjoin an election to annex certain property in plaintiff's township on the ground of adequacy of legal remedy under statute relative to quo warranto proceedings); and *Groh v City of Battle Creek*, 368 Mich 653; 118 NW2d 829 (1962) (Supreme Court upheld the board of canvassers' ruling on the number of signers on an annexation petition and determined that such question may be raised by quo warranto proceedings after the election).

This Court may not precipitously intervene in the political arena and preempt a vote of the people. *Senior Accountants Analysts & Appraisers Ass'n v Detroit*, 218 Mich App 263; 553 NW2d 679 (1996). Appellants may not seek both a preliminary injunction and leave for quo warranto.

C. Certification should not be enjoined for irregularities regarding the recording and returning of the votes.

Gracey v Grosse Pointe Farms Clerk, 182 Mich App 193; 452 NW2 471 (1989) is a compelling case which involved a judicial election for the City of Grosse Pointe. Ms Gracey, the wife of a candidate, hand delivered a number of absentee ballots to the city clerk's office, although she was not a "member of the immediate family of the voter" within the meaning of the statute defining those who may return absentee voter ballots. For at least one absentee ballot, the city clerk's office had instructed Ms. Gracey to take it to the voter to obtain a signature on the ballot envelope, and then return it to the clerk's office.

The city clerk refused to canvass the ballots and the Wayne County Board of Canvassers ("Board") failed to canvass the ballots within the time allowed by statute. The Board of State Canvassers canvassed the ballots and certified the results. Mr. Casazza requested a recount. The Board conducted the recount and forwarded a written report of its findings to the county prosecutor and to the circuit judges. The Board took the position that it should not certify the recount results

until the prosecutor completed its investigation. Mr. Gracey filed a mandamus action to compel the Board to certify the recount results. Mr. Casazza filed for declaratory relief.

The appellate court held that the Board violated a clear legal duty to complete the recount:

[P]rovisions of an election statute which affect the time and place of the election and the legal qualifications of the electors are of the substance of the election, whereas those touching only the recording and returning of the legal votes received and the mode and manner of conducting the details of the election are directory. Irregularities not tending to affect results are not to defeat the will of the majority, which is to be respected, even when irregularly expressed. The officers of election may be liable to punishment for a violation of the directory provisions of a statute, yet the people are not to suffer on account of the default of their agents.

Gracey v Grosse Pointe Farms Clerk, *id* at 209.

D. Statutes should be construed to prevent the disenfranchisement of voters through the mistakes of others.

Public policy requires that statutes controlling the manner in which elections are conducted be construed as far as possible in a way which prevents the disenfranchisement of voters through the fraud or mistake of others. *Kennedy v Board of State Canvassers*, 127 Mich App 493; 339 NW2d 477 (1983).

All doubts as to technical deficiencies or failure to comply with the exact letter of procedural requirements are resolved in favor of permitting the people to vote and express their will on any proposal subject to election. *Charter Twp of Meridian v City of East Lansing*, 101 Mich App 805; 300 NW2d 703 (1981).

The general rule is that courts do not disenfranchise voters because of election officials' mistakes, negligence or misconduct. *Gracey v Grosse Pointe Farms Clerk*, *supra*. See *Stamos v Genesee County Board of Canvassers*, 46 Mich App 636; 208 NW2d 551 (1973) (Due to unforeseen reasons, field supervisor was unable to deliver absentee ballots to precincts prior to

8:00 p.m. closing); *Rosenbrock v School District No 3, Fractional Tp of Williams and Monitor*, et al, 344 Mich 335; 74 NW2d 32 (1955) (Secretary of the school board incorrectly advised election inspectors that electors who were not taxpayers should be allowed to vote on a millage question); *Carnes v Livingston County Board of Education*, 341 Mich 600; 67 NW2d 795 (1954) (Board failed to provide written notice to members and moderator failed to preside at election meeting); *Toole v State Board of Dentistry* 300 Mich 180; 1 NW2d 502 (1942) (Text of referendum was not published in full on voting machine); *Miller v Miller*, 266 Mich 127; 253 NW 241 (Board failed to withdraw excess ballots from the ballot box during a recount and refused to recount the ballots in boxes containing no tally sheet); *Abbott v Board of Canvassers of Montcalm County*, 172 Mich 416; 137 NW 961 (1912) (Precinct inspectors did not place ballot numbers opposite the names in the poll book); *Horning v Burgess* 119 Mich 51; 77 NW 446 (1898) (Election inspector marked the ballots in the lower corner, rather than the upper left-hand corner); *People v Avery*, 102 Mich 572; 61 NW 4 (1894) (Candidate acted as an election inspector and notices of election posted, per repealed law); *Lindstrom v Board of Canvassers of Manistee County*, 49 Mich 467; 54 NW 280 (1893) (Ballots for city officers were placed in box for state officers).

Public policy favors that any alleged errors committed by election officials should not be used to disenfranchise the voters of the city of Detroit.

E. Cathy Garrett is not a proper party and should be dismissed from this matter.

Individuals having such interests in the subject matter that their presence is essential to permit the court to render complete relief must be made parties. MCR 2.205. A party is “indispensable” to a case if that party has an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its

final determination may be wholly inconsistent with equity and good conscience. *Mather Investors, v Larson*, 271 Mich App 254, 257; 720 NW2d 575 (2006).

Appellants have requested an Application For Leave To File Complaint for Quo Warranto (“Application”) under MCL §600.4545 and MCR 3.306(B)(2). (Complaint, pages 13 and 14). They ask for an order prohibiting Defendants’ from certifying the election results” (Complaint, page 20).

The Wayne County Board of Canvassers performs the canvass and certifies election results:

...the board of county canvassers shall meet at the office of the county clerk no later than 9 a.m. on the Thursday after any election held in the county.

MCL 168.821(1)

The board of county canvassers shall then proceed without delay to canvass the returns of votes cast for all candidates for offices voted for and all questions voted on at the election, according to the precinct returns filed with the probate judge or presiding probate judge by the several city and township clerks, or in case of local elections according to the precinct returns filed with the county clerk, and must conclude the canvass at the earliest possible time and in every case no later than the fourteenth day after the election. (Emphasis added).

MCL 168.822(1).

(1) A 4-member board of county canvassers is established in every county in this state. All of the powers granted to and duties required by law to be performed by all boards of canvassers established by law, other than the board of state canvassers, are granted to and required to be performed by the board of county canvassers.

MCL 168.24a.

Upon completion of the canvass under section 822, the board of county canvassers shall prepare a statement in detail of the number of votes cast for each office, the names of the persons for whom such votes were given, and the number of votes given to each person, as shown by the returns of the boards of inspectors of election of the various voting precincts of the county. The board of county canvassers shall also prepare a statement in detail of the number of votes cast on any proposed constitutional amendment or other ballot question submitted to the electors at the

election and the number of votes cast in favor of and the number of votes cast against such proposed amendment or other ballot question, as shown by such returns.

MCL 1681.824(1).

The County Clerk is not a member of the Board of Canvassers. She is not responsible for administering the election night tabulation or canvassing the precincts. She should not be a party to this matter.

A municipality is a necessary party to an action for quo warranto for fraud or error in an election at which a constitutional amendment, question, or proposition is submitted to the electors. MCL §600.4545. The presence of the county clerk is not necessary for this Court to determine this matter.

III. Appellants will not be harmed if no injunction should issue.

Assuming the Board did not certify election results within 14 days, MCL §168.822(2) mandates that the board of state canvassers shall “make the necessary determinations and certify the results within the 10 days immediately following the receipt of the records from the board of county canvassers.” Therefore, Appellants would not be harmed from the Board’s failure to timely canvass and certify.

The Michigan Secretary of State is the chief elections officer in Michigan and has supervisory control over local election officials and investigates violations of election laws. MCL §168.21; MCL §168.31. The lower court recognized that Appellants can request intercession by the Secretary of State. (Exhibit 1, page 11).

The lower court also noted that Appellants may petition for a recount of the votes of the election, if the candidate perceives there was fraud or mistake. MCL §168. 862; MCL §168.879. Any candidate perceiving fraud or mistake has the right to request a recount. (Exhibit 1, page 11).

The Supreme Court has emphasized that courts should not interfere with discretionary acts of municipal officials:

Where a municipality has the power to engage in an activity for a public purpose, the courts will not interfere with the discretionary acts of its municipal officials. In order to warrant the interposition of a court of equity in municipal affairs, there must be a malicious intent, capricious action or corrupt conduct, something which shows the action of the body whose acts are complained of did not arise from an exercise of judgment and discretion vested by law in them. (Internal citations omitted) (Emphasis added).

Moran v Detroit Board of Election Commissioners, 334 Mich 234, 240; 54 NW2 310 (1952).

In the instant case, the lower court noted that Appellants' request to stop certification was extraordinary:

It would be an unprecedented exercise of judicial activism for this Court to stop the certification process of the Wayne County Board of Canvassers. The Court cannot defy a legislatively crafted process, substitute its judgment for that of the Legislature, and appoint an independent auditory because of an unwieldy process. In addition to being an unwarranted intrusion on the authority of the Legislature, such an audit would require the rest of the County and State to wait on the results.

(Exhibit 1, page 11).

IV. Appellants did not meet their burden of proof and a motion for peremptory reversal is not warranted.

An injunction represents an extraordinary act of judicial power that should be employed sparingly and only with full conviction of its urgent necessity. The party seeking injunctive relief has the burden of establishing that a preliminary injunction should be issued. MCR 3.310(A)(4). The lower court's grant of a temporary injunction is a question of discretion. *L&L Concession Co v Goldhar-Zimmer Theatre Enterprises*, 332 Mich 382; 51 NW2d 918 (1952). The Michigan courts have not upheld the exercise of an injunction in quo warranto cases. Appellants have not shown any extraordinary circumstances.

Appellants ask for peremptory reversal because the lower court's decision manifested clear reversible error per MCR 7.211 (C)(4). However, Appellants have not demonstrated such. The lower court painstakingly reviewed the affidavits submitted by both parties and determined which were credible. (Exhibit 1, page 9). Deference should be provided to the factfinder.

CONCLUSION

Wayne County Board of Canvassers and Clerk Cathy M. Garrett request that this Honorable Court deny the Motion For Immediate Consideration and the Emergency Motion For Peremptory Reversal.

Respectfully submitted,

BY: /s/ Janet Anderson Davis
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Dated: November 16, 2020

PROOF OF SERVICE

I certify that on November 16, 2020, I filed *WAYNE COUNTY'S RESPONSE TO CONSTANTINO'S MOTION FOR PEREMPTORY REVERSAL AND MOTION FOR IMMEDIATE CONSIDERATION*, along with this *Proof of Service* with the clerk of the court via the court's electronic filing system which will send notice to all parties.

/s/Susan Sweetman
Paralegal