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STATE OF MICHIGAN

COURT OF APPEALS

COMMITTEE TO BAN FRACKING IN MICHIGAN and LUANNE KOZMA,

Plaintiffs-Appellants,

v

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

Defendants-Appellees.

UNPUBLISHED
April 2, 2020

No. 350161
Court of Claims
LC No. 18-000274-MM

Before: CAMERON, P.J., and SHAPIRO and LETICA, JJ.

PER CURIAM.

Plaintiffs appeal the Court of Claims order granting summary disposition to defendants under MCR 2.116(C)(10) (no genuine issue of material fact). For the reasons stated in this opinion, we reverse and remand to the Secretary of State to forward plaintiffs' petition to the Board of State Canvassers.

I.

Plaintiff Committee to Ban Fracking in Michigan is engaged in a statutory initiative campaign to ban horizontal hydraulic fracturing, which is commonly known as "fracking." Plaintiff LuAnne Kozma is the director of that campaign. In April 2015, the Board approved the form of plaintiffs' initiative petition. The front-page summary of the proposed legislation provided that "[t]his proposal is to be voted on in the November 8, 2016 General Election." No date of election was provided in the full language of the petition's text.

Plaintiffs began circulating their petition for signatures in May 2015. At the time, MCL 168.472a provided a rebuttable presumption that signatures on a petition made 180 days before

filing would not count.[1] 180 days after they had begun circulation, plaintiffs had collected approximately 150,000 signatures. The number of valid signatures to achieve ballot status was 252,523 signatures.

In January 2016, plaintiffs filed a complaint seeking to challenge the constitutionality of the 180-day rule under former MCL 168.472a. The Court of Claims granted defendants summary disposition, holding that no actual controversy existed because plaintiffs had not collected enough signatures to submit their petition to the Secretary and their ability to do so was speculative. Plaintiffs appealed that ruling, and we affirmed. *Comm to Ban Fracking in Mich v Dir of Elections*, unpublished per curiam opinion of the Court of Appeals, issued March 14, 2017 (Docket No. 334480), pp 2-4.

Plaintiffs continued to collect signatures and on November 5, 2018—the day before the 2018 election—plaintiffs sought to file the initiative petition with the Secretary for a vote, if necessary, in the 2020 election. According to plaintiffs, they had collected about 270,962 signatures. However, the Director of Elections refused to accept the petition because the front-page summary stated that it was to be voted on at the November 8, 2016 general election and that election had already passed. Plaintiffs filed a complaint in this Court seeking a writ of mandamus requiring the Director to accept their legislative initiative petition. We denied the complaint. *Comm to Ban Fracking in Mich v Secretary of State*, unpublished order of the Court of Appeals, entered November 15, 2018 (Docket No. 346280).[2]

In December 2018, plaintiffs filed the instant complaint, challenging the Secretary's action in several respects including a claim that the Secretary had usurped the power of the Board, which is the only entity charged by statute with determining the sufficiency and adequacy of an initiative petition. Plaintiffs also alleged that the petition did not violate MCL 168.471, which provides that petitions must be filed at least 160 days before the election at which the proposal would be voted on. Defendants moved for summary disposition, arguing that inclusion of the incorrect election date was a defect that rendered plaintiffs' petition invalid and untimely. According to defendants, MCL 168.471 contemplates that the petition's sponsor will designate the general election in which the sponsor sought to have the proposed legislation voted upon.

In its opinion and order, the Court of Claims found that even though there is no statutory requirement that initiative petitions include an expected election date, the erroneous date resulted in a violation of MCL 168.471. The proposed legislation was to be voted on in the November

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[1] Effective June 7, 2016, MCL 168.472a was amended to remove the rebuttable presumption and now provides that signatures that are more than 180 days old "shall not be counted[.]" 2016 PA 142.

[2] In the present action, the Court of Claims requested that the parties brief whether the doctrine of res judicata barred the action. Specifically, the trial court asked whether the Court of Appeals' order denying mandamus relief was a final judgment. Both plaintiffs and defendants stated that this Court's order did not decide the issue on the merits.

2016 general election, an election as to which the 160-day cutoff had long passed at the time of petition's filing. Accordingly, the Court of Claims granted defendants summary disposition.

We reverse because we agree with plaintiffs that the petition did not violate the 160-day rule. Given our ruling, we need not address whether the Secretary acted outside of her authority by rejecting the petition or any of the other issues raised on appeal.[3]

II.

We review de novo a lower court's decision on a motion for summary disposition. See *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A party is entitled to summary disposition if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." MCR 2.116(C)(10). We also review de novo questions involving the interpretation and application of statutes. *Linden v Citizens Ins Co of America*, 308 Mich App 89, 91-92; 862 NW2d 438 (2014).

III.

The Michigan Constitution provides that "[t]he people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum." 1963 Const, art 2, § 9. To invoke the power of initiative, petitions must be signed by registered voters amounting to not less than 8% of the total vote cast for all candidates for governor in the preceding election for governor. 1963 Const, art 2, § 9. The Legislature is required to enact or reject the initiative within 40 session days of when the initiative is received. Const 1963, art 2, § 9. "The legislature shall implement the provisions of this section." Const 1963, art 2, § 9. "Constitutional and statutory initiative and referendum provisions should be liberally construed to effectuate their purposes, to facilitate rather than hamper the exercise by the people of these reserved rights." *Newsome v Riley*, 69 Mich App 725, 729; 245 NW2d 374 (1976).

The Court of Claims erred in concluding that the inclusion of an expected election date in the summary meant that the initiative could only be voted on that date. This was legal error because it is statutory law, not the circulator's intent, that determines when an initiative is to be voted on. MCL 168.471 states in relevant part that initiative petitions "must be filed with the secretary of state at least 160 days *before the election at which the proposed law would appear on the ballot if the legislature rejects or fails to enact the proposed law*." (Emphasis added). Given that initiative petitions are not required to state the election at which the proposed law will appear, we fail to see why the reference to an already-passed election should be the date from which the

[3] Plaintiffs raised several other issues in their complaint. They asserted that the 180-day limit on signature gathering is unconstitutional, that the Secretary's actions violated equal protection and that the Secretary was estopped from refusing to accept the petition because of statements defendants made in the prior action before the Court of Claims. The Court of Claims did not address the 180-day rule, but ruled in defendants' favor on the other claims.

160-day period is calculated. By statute, the petition may not be voted on in an election less than 160 days away, and so, whatever the petitioner's intent, the relevant election date is the next one that is at least 160 days away.[4]

Regardless of any representation by plaintiffs, because the petition was filed on November 5, 2018—one day before the November 2018 election—the November 2020 is the election that the proposed law would appear on if not approved by the Legislature. That is clear from a review of the timing requirements governing initiative petitions. Upon receiving notification from the Secretary, the Board canvasses the petition and the supporting signatures, MCL 168.476(1), and "meets to make a final determination on challenges to and sufficiency of a petition," MCL 168.476(3). The Board is required to do so at least two months before "the election at which the proposal is to be submitted." MCL 168.477(1), as amended by 2012 PA 276.[5] The Legislature must act on an initiative petition within 40 session days. Const 1963, art 2, § 9. Thus, the statute and constitutional provisions governing initiative petitions establish that for a petition filed on November 5, 2018, the election at which the proposed law would appear on the ballot if the Legislature rejected or failed to enact the petition was the November 2020 election. Accordingly, compliance 160-day rule in this case is measured from the November 2020 election. Plaintiffs satisfied that part of MCL 168.471 because the petition was filed at least 160 days before that election.[6]

On remand, the Secretary shall accept the petition for filing and forward it to the Board for canvassing as required by the statute.[7] Further, we agree with plaintiffs that the Court of Claims

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[4] This does not entitle a petitioner to collect signatures indefinitely because signatures obtained prior to the general election preceding the filing are void. See MCL 168.473b.

[5] MCL 168.477 now provides that this period is 100 days for initiative petitions.

[6] In addition, MCL 168.473b does not preclude plaintiffs' petition from appearing on the November 2020 ballot. That statute provides that "[s]ignatures on a petition . . . to initiate legislation collected prior to a November general election at which a governor is elected shall not be filed after the date of that November general election." MCL 168.473b requires that signatures on a petition to initiate legislation be filed before the upcoming general election, but it does not state that those signatures become invalid after that election. Nor does it require that the petition be voted in the upcoming general election if not acted on by the Legislature. And plaintiffs complied with this statutory section by filing their petition on November 5, 2018, one day before the upcoming gubernatorial election.

[7] It is the Board's responsibility to make an official declaration regarding the adequacy and sufficiency of the petition. MCL 168.477(1). It is also the Board's duty to approve the summary of the proposed amendment's purpose, MCL 168.482b, which is where the alleged defect in this case is located. "In essence, the Board ascertains whether sufficient valid signatures support the petition *and whether the petition is in the proper form*." *Citizens Protecting Michigan's Constitution v Secretary of State*, 324 Mich App 561, 585; 922 NW2d 404 (2018), aff'd 503 Mich 42 (2018) (emphasis added). The Board in fact routinely determines whether the form of a petition complied with the Legislature's requirements. See e.g., *Council About Parochiaid v Secretary of*

erred in finding that the petition was not filed on November 5, 2018. Plaintiffs tendered their petition for filing, and even assuming the Secretary had the authority to reject it, the basis for doing so was erroneous. Because the Director wrongly refused to accept the filing, the petition must be treated as having been filed on that day. To hold otherwise would punish petition sponsors and the electorate for unlawful actions taken by election officials. Thus, the petition must be treated as having been filed on November 5, 2018.

IV.

In sum, plaintiffs submitted an initiative petition that was facially compliant with all statutory requirements. The Secretary was required to pass it on to the Board for the Board to determine the validity of the petition and canvass the signatures. If the Board rejects the petition, plaintiff may seek review before the Supreme Court. See MCL 168.479.

Reversed and remanded to the Secretary for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Thomas C. Cameron
/s/ Douglas B. Shapiro
/s/ Anica Letica

State, 403 Mich 396, 397; 270 NW2d 1 (1978) (Board determined that the petitioner complied with statutory form requirements when descriptive material was attached to the petitions during circulation); *Stand Up for Democracy v Secretary of State*, 297 Mich App 45, 55; 824 NW2d 220 (2012), rev'd 492 Mich 588 (2012) (Board rejected a petition that did not comply with statutory font requirements); *Auto Club of Mich Comm for Lower Rates Now v Secretary of State*, 195 Mich App 613, 624; 491 NW2d 269 (1992) (Board determined that a tear sheet did not comply with statutory form requirements).