

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

BRIAN EBBERS, JEFF STEINPORT and  
KAREN NEAL,

UNPUBLISHED  
June 19, 2008

Plaintiffs-Appellants,

v

No. 283782  
Kent Circuit Court  
LC No. 08-000699-CZ

SECRETARY OF STATE, ATTORNEY  
GENERAL and KENT COUNTY  
PROSECUTOR,

Defendants-Appellees,

and

STATE REPRESENTATIVE ROBERT DEAN,

Intervening Defendant-Appellee.

---

Before: Bandstra, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court order declaring MCL 168.957 constitutional, denying plaintiffs' request for injunctive relief and entry of judgment in favor of defendants. We dismiss the appeal as moot.

I. Factual History

Plaintiff Ebbers is a registered voter in Representative Dean's electoral district (Michigan 75<sup>th</sup> House District). Ebbers sponsored a recall petition to unseat Dean based on a previous vote by Dean to raise taxes. Plaintiff Steinport functions as the recall campaign's spokesperson, but is precluded by MCL 168.957 from circulating recall petitions because he does not live in the proper electoral district.<sup>1</sup>

---

<sup>1</sup> Plaintiff Neal is a professional petitioner from Oklahoma. She also is precluded from  
(continued...)

On November 5, 2007, the Kent County Election Commission approved the language of the Dean recall petition for circulation. In accordance with MCL 168.955, plaintiffs were required to obtain the signatures of “registered and qualified electors equal to no less than 25 percent of the number of votes cast for candidates for the office of governor at the last preceding general election in the electoral district of the officer sought to be recalled.” It is undisputed that this requirement translated into requiring plaintiffs to collect 8,714 signatures in order to successfully petition Dean’s recall.

Ebbers began circulating the recall petitions on December 17, 2007. As of February 12, 2008, Ebbers had gathered only approximately 1,000 of the 8,714 required signatures. Plaintiffs filed the underlying lawsuit on January 22, 2008, seeking injunctive relief and challenging the constitutionality of MCL 168.957. The trial court conducted a hearing on February 5, 2008, and on February 12, 2008, the date trial was scheduled to commence, Dean sought leave to intervene, which was granted. The trial court ruled the statute was constitutional and enforceable as written.

The claim of appeal in the above captioned matter was filed with this Court on February 20, 2008. On March 7, 2008, plaintiffs moved for peremptory reversal, which this Court denied.<sup>2</sup> On March 17, 2008, plaintiffs filed a motion to expedite, which this Court also denied, based in part on the priority the appeal would receive, pursuant to MCR 7.213(C)(4).<sup>3</sup> In their motion to expedite, plaintiffs did not address all of the relevant statutory timelines, which would impact the viability of their recall efforts. Plaintiffs merely referenced an “extremely tight timeline” indicating “the deadline for filing the signatures with the Secretary of State is May 1, 2008.” Plaintiffs failed to explain or elaborate regarding the expiration of the approved petition language, the status regarding the validity of the signatures obtained to date, or the inherent six month statutory deadline imposed by MCL 168.951, which precludes the filing of a recall petition “against an officer during the last 6 months of the officer’s term of office.”<sup>4</sup> This was of significance as plaintiffs had only until June 30, 2008 to file their petition because Dean’s term of office would terminate on December 31, 2008.

## II. Analysis

Once petition language is approved, petition sponsors, pursuant to MCL 168.952(7), have 180 days to secure signatures. Specifically, “a petition that is determined by the circuit court to be of sufficient clarity is valid for 180 days following the last determination of sufficient clarity under this section.” MCL 168.952(7). However, once the 180-day period has expired, the

---

(...continued)

circulating recall petitions based on the language of MCL 168.957.

<sup>2</sup> *Ebbers v Secretary of State*, unpublished order of the Court of Appeals, entered March 24, 2008 (Docket No. 283782).

<sup>3</sup> *Ebbers v Secretary of State*, unpublished order of the Court of Appeals, entered March 26, 2008 (Docket No. 283782).

<sup>4</sup> MCL 168.951 also precludes the filing of a recall petition “until the officer has actually performed the duties of the office to which elected for a period of 6 months during the current term of that office.”

petition is no longer valid and cannot be accepted, but the sponsors are not precluded from “resubmitting a recall petition for a determination of sufficient clarity.” *Id.* In addition, signatures are only valid for a period of 90 days “before the filing of the petition.” MCL 168.961(2)(d).

Although plaintiffs technically had until June 30, 2008, to file a petition in compliance with the six-month requirements of MCL 168.951, the viability of meeting this deadline and the need for expedited review required an explanation that the original recall petition, the language of which was approved on November 5, 2007, was no longer valid in accordance with MCL 168.952(7), necessitating resubmission for approval of the petition language. In addition, the initial 1,000 signatures obtained had also expired in accordance with MCL 168.961(2)(d), thus necessitating plaintiffs having to re-initiate their recall effort from the very preliminary stages. Since this Court did not even hear plaintiffs’ appeal until June 11, 2008, it is improbable that the necessary resubmission of the petition language for approval and gathering of signatures could be accomplished within the required timeframes of MCL 168.951. This was verified in plaintiffs’ appellate brief in which they asserted having already missed the deadline for inclusion of this matter on the August 2008 ballot.<sup>5</sup> “An issue is moot if an event has occurred that renders it impossible for the court, if it should decide in favor of the party, to grant relief.” *City of Warren v Detroit*, 261 Mich App 165, 166 n 1; 680 NW2d 57 (2004), quoting *Michigan Nat’l Bank v St Paul Fire & Marine Ins Co*, 223 Mich App 19, 21; 566 NW2d 7 (1997). Thus, plaintiffs’ appeal is rendered moot based on the procedural impossibility of meeting the required statutory deadlines given the natural expiration of Dean’s term of office. Further, plaintiffs’ counsel, during oral argument before this Court, acknowledged that the factual circumstances leading to this appeal, given the existent deadlines, rendered their action moot, but asserted review of the underlying issue should proceed based on an exception to the mootness doctrine.

Although we note that exceptions to preclusion of review under the doctrine of mootness exist, we find they are not applicable to the circumstances of this case. While this Court may not “decide moot questions in the guise of giving declaratory relief,” *Dep’t of Social Services v Emmanuel Baptist Preschool*, 434 Mich 380, 470; 455 NW2d 1 (1990) (Boyle, J.), a moot issue may be reviewed if it is deemed to be of public significance and is likely to recur while simultaneously likely to evade judicial review, *Warren, supra* at 166 n 1. See also *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007). The exception that a matter is “capable of repetition, yet evading review” is applicable to prevent a case from being moot only when “(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again.” *Illinois State Bd of Elections v Socialist Workers Party*, 440 US 173, 187; 99 S Ct 983; 59 L Ed 2d 230 (1979), quoting *Weinstein v Bradford*, 423 US 147, 149; 96 S Ct 347; 46 L Ed 2d 350 (1975). Given the procedural and factual history

---

<sup>5</sup> If plaintiffs achieved the impossible they could potentially have this matter on the November 2008 ballot in accordance with MCL 168.963(2), which provides in relevant part that “the filing official with whom the petition is filed shall call the special election. The election shall be held on the next regular election date that is not less than 95 days after the petition is filed.” In effect, they would effectuate a recall of this official for the final month of his current term.

outlined, *supra*, it is obvious that significant delays occurred in this case due to a combination of factors including, but not limited to, plaintiffs' delay in seeking circuit court intervention and the failure in this Court to adequately explain the need for expedited action or to appeal or seek reconsideration of the prior order denying that the matter be placed on an expedited docket. In addition, it is certainly conceivable that circumstances, such as those presented, could recur without such delays and, thus, another appeal could proceed to a decision on the merits and in accordance with the required statutory timeframes. Consequently, we find that this matter is moot and not subject to review under this exception.

Finally, plaintiffs assert the right to attorney fees in accordance with 42 USC 1983, which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

If this provision is violated, 42 USC 1988(b) provides for the award of attorney fees, stating in relevant part, "[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Based on the trial court's determination regarding the constitutionality of the challenged statute, that court did not reach this issue.

We note the discretionary nature of 42 USC 1988(b), indicating that an award of attorney fees is neither mandatory nor automatic, even if it is determined that 42 USC 1983 has been violated. In addition, § 1988(b) allows an award of attorney fees to the "prevailing party." "[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Farrar v Hobby*, 506 US 103, 109; 113 S Ct 566; 121 L Ed 2d 494 (1992) (internal citation omitted). Clearly, given the determination that plaintiffs' claim is rendered moot, they cannot be construed as prevailing parties for the award of attorney fees in accordance with 42 USC 1988(b). "[T]he presence of a claim for attorney's fees does not shield claims that are otherwise moot." *Bethany Med Ctr v Harder*, 693 F Supp 968, 977 (D Kan, 1988). Notably:

Because the fee may be awarded only to the prevailing party, to allow this interest to prevent the claim itself from being moot would be a boot strap. The award of fees . . . is not compensation for the injury incurred, but rather it is a consequence of prevailing on the "case or controversy" before the court. [*Id.*]

Consequently, we deny plaintiffs' request for attorney fees and find, "[I]t would be inappropriate

to conclude that a ‘case or controversy’ existed merely in order to permit the awarding of fees to a party.” *Id.*

Plaintiffs’ appeal is dismissed as moot.

/s/ Richard A. Bandstra

/s/ Michael J. Talbot

/s/ Bill Schuette