

IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2017

No. 85

LINDA H. LAMONE,

Appellant and Petitioner,

v.

NANCY LEWIN, et al.,

Appellees and Respondents.

On Appeal from the Circuit Court for Anne Arundel County
(Glenn L. Klavans., Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals of Maryland

APPELLEES' REPLY BRIEF

H. MARK STICHEL

CPF No. 8312010443

HMSTICHEL@AGTLAWYERS.COM

ELIZABETH A. HARLAN

CPF No. 1101050005

EHARLAN@AGTLAWYERS.COM

ASTRACHAN GUNST THOMAS, P.C.

217 EAST REDWOOD STREET, 21ST FLOOR

BALTIMORE, MARYLAND 21202

TELEPHONE: 410-783-3550

Attorneys for Appellees and Respondents

May 1, 2018

TABLE OF CONTENTS

INTRODUCTION1

I. Laches Does Not Bar This Action.....2

 A. Respondents Did Not Delay in Seeking Injunctive Relief..... 3

 B. Respondents Moved Expeditiously to Encourage Mr. Oaks to Withdraw His
 Voter Registration.....4

II. The State Board Has Adequate Time to Reform the Two Ballots in Legislative
District 41.....8

CONCLUSION11

TABLE OF AUTHORITIES

CASES

Attorney Grievance Com’n of Maryland v. Zimmerman,
428 Md. 119, 50 A.3d 1205 (2012)8

Baker v. O’Malley,
217 Md. App. 288 (2014)6, 7

Consumer Protection Division v. Morgan,
387 Md. 125, 874 A.2d 919 (2005)9

Lamone v. Schlakman,
451 Md. 468 (2017) 6, 7

Liddy v. Lamone,
398 Md. 233 (2007)6, 7

State Center, LLC v. Lexington Charles Ltd. Partnership,
438 Md. 451, 92 A.3d 400 (2014)2

Zappone v. Liberty Life Ins. Co.,
349 Md. 45, 706 A.2d 1060 (1998)3

STATUTES

Md. Code Ann., Elec. Law § 5-9039, 10

Md. Code Ann., Elec. Law § 5-9049, 10

RULES

Md. Rules, Rule 8-131(c).....8

INTRODUCTION

Respondents, who all are voters in District 41, and two of whom are running for Democratic State Central Committee, request that this Court order the State Board to remove Nathaniel T. Oaks' name from the ballots that will be distributed to Legislative District 41 voters on June 26, 2018. This is an unusual situation. Mr. Oaks was the incumbent State Senator for District 41 until his resignation of March 29, 2018. Mr. Oaks has received significant votes in past Democratic Party Primary Elections in Legislative District 41.¹ He has pleaded guilty to two felony counts that carry a recommended minimum sentence of 97 months. (E. 46-47.) It is a near

¹ Mr. Oaks won the Democratic Party nomination for the House of Delegates in Legislative District 41 in eight elections. 2014 – second out of three candidates; 2010 – third out of three candidates.; 2006 – third out of three candidates.; 2002 – second out of three candidates.; 1998 – first out of three candidates; 1994 – second out of three candidates; 1986 – second out of three candidates; 1982 (results not available online).

http://elections.state.md.us/elections/2014/results/primary/gen_results_2014_1_01_641.html);

http://elections.state.md.us/elections/2010/results/Primary/gen_results_2010_1_01_641.html);

http://elections.state.md.us/elections/2006/results/primary/legislative_district_41.html; http://elections.state.md.us/elections/2002/results/p_ld41.html;

http://elections.state.md.us/elections/1998/results_1998/pahod.html;

http://elections.state.md.us/elections/1994/results_1994/pahod.html

http://elections.state.md.us/elections/1986/results_1986/pahod.html

(All results last accessed May 1, 2018.)

certainty that Mr. Oaks will be sentenced to serve time in prison, and that he will for this reason be disqualified from holding office. In addition, Mr. Oaks has requested that he name be removed from the ballot (E. 113), and has taken the further step of removing himself from the statewide voter registration list. (E. 105-06.) This double disqualification of an established vote-getter is not a factual scenario that will often reoccur. To leave Mr. Oaks' name on the ballot under these circumstances would be an affront to the concept of free and fair elections in Maryland.

I. Laches Does Not Bar This Action.

The State Board's laches argument targets two alleged delays: a purported delay in seeking injunctive relief after the filing of this action, and an alleged delay in requesting that Mr. Oaks withdraw his voter registration. Both arguments should fail.

In order for laches to bar a claim:

there [must be] an unreasonable delay in the assertion of one's rights. There is no inflexible rule as to what constitutes, or what does not constitute, laches; hence its existence must be determined by the facts and circumstances of each case. The passage of time, alone, does not constitute laches but is simply one of the many circumstances from which a determination of what constitutes an unreasonable and unjustifiable delay may be made.

State Center, LLC v. Lexington Charles Ltd. Partnership, 438 Md. 451, 589-90, 92 A.3d 400, 482-83 (2014) (internal citations and quotations omitted).

A. Respondents Did Not Delay in Seeking Injunctive Relief.

There is no question that Respondents filed this action within the ten-day deadline established by EL § 12-202. Immediately after filing, counsel for Respondents began efforts to resolve this matter administratively, by seeking relief from the State Board. Litigants should not be placed at a disadvantage for having efficiently sought administrative relief, a concurrent remedy available to Respondents here. *See Zappone v. Liberty Life Ins. Co.*, 349 Md. 45, 60, 706 A.2d 1060 (1998) (explaining that an administrative remedy may be exclusive, primary but not exclusive, or fully concurrent with neither remedy being primary). With neither remedy being primary here, Respondents' pursuit of an administrative remedy two business days before filing suit does not constitute unreasonable delay.

On April 9, 2018, Respondents filed this action in the Circuit Court for Anne Arundel County. (E. 1.) By letter dated April 11, 2018, Respondents requested that the Maryland State Board of Elections remove Mr. Oaks' name from the ballot. (E. 102-03.) The following day, counsel for Respondents made an oral presentation to the State Board. On Friday, April 13, 2018, Respondents' counsel emailed Assistant Attorney General Andrea Trento to inquire as to whether the State Board had changed its position regarding the inclusion of Mr. Oaks' name on the ballot. (E. 114.) On Saturday, April 14, 2018, Mr. Trento informed Respondents' counsel that the State Board had taken no further action. (E. 114.) On Monday, April 16, 2018,

Respondents filed for a temporary restraining order, or in the alternative, for a preliminary injunction. (E. 2-3.)

Respondents moved quickly and intelligently in this case. To characterize the course of events between April 9 and April 16 as “unreasonable delay” would discourage all efforts at administrative resolutions in elections cases. Once counsel for Respondents knew the State Board’s response, the TRO and request for preliminary injunction was filed the next working day. There was no unreasonable delay here.

B. Respondents Moved Expeditiously to Encourage Mr. Oaks to Withdraw His Voter Registration.

Mr. Oaks pleaded guilty to two felony counts on March 29, 2018, and is facing a recommended minimum sentence of 97 months under the federal sentencing guidelines. (E. 46-47.) Respondents contended at the April 20, 2018, preliminary injunction hearing, and still contend, that the fact that it is a near certainty that Mr. Oaks will be disqualified from serving office once his sentencing takes place on July 17, 2018, is a sufficient factual scenario to support removal of Mr. Oaks’ name from the ballot. (E. 75-76).

However, when Judge Klavans, in his ruling from the bench on April 20, 2018, noted the uncertainty inherent in this scenario, however slight, prevented him from granting the injunction (E. 41-42), Respondents moved as quickly as possible to secure Mr. Oaks’ agreement to withdraw his name from the statewide voter

registration list. Over the weekend immediately following the April 20, 2018, Mr. Oaks agreed to remove his name from the voter registration list. (E. 104.) That Monday, April 23, 2018, Mr. Oaks signed a written request to the Baltimore City Board of Elections requesting that his name be removed from the voter registration files of the State of Maryland (E. 105) which was request was accepted and processed by the Baltimore City Board of Elections that same day. (E. 106.) The same day, Respondents filed a Second Amended Verified Complaint and a Motion for Reconsideration in light of the new fact—that Mr. Oaks had withdrawn is voter registration.²

On Tuesday, April 24, 2018, counsel for all parties appeared in Circuit Court to expedite the process of having the Motion for Reconsideration heard. Judge Klavans was on vacation for the week, and for this reason, counsel appeared before the Honorable Cathleen M. Vitale, the chambers judge. Judge Vitale declined to rule on the motion. Counsel agreed that the State Board would file an opposition to the Motion for Reconsideration by 6:00 p.m. on Wednesday, April 25, and Judge Vitale scheduled a hearing in the matter for April 26, 2018 at 1:30 p.m. (E. 175.) At 9:46 a.m. on Thursday, April 26, 2018, Nancy Baker, Administrative Assistant to

² The decision before Judge Klavans on Thursday, April 26 was a Motion for Reconsideration. (E. 168-69.) This was not a new motion for preliminary injunction. Judge Klavans had previously presided over a full evidentiary hearing in connection with the Motion for a Preliminary Injunction on April 20, 2018. (E. 9-44.)

the Honorable Glenn L. Klavans informed counsel that Judge Klavans would be deciding the motion for reconsideration and that no hearing would be held. Respondents filed a reply brief at 10:01 a.m. and Ms. Baker emailed Judge Klavans' ruling to all counsel at 11:23 a.m. That same day, the State Board filed notices of appeal, petitioned the Court for a writ of certiorari and filed a motion to stay the Circuit Court's order. On Friday, April 27, this Court issued a writ of certiorari and advanced the briefing and argument of this case.

It is difficult to imagine a more streamlined litigation effort. At every point along the way, Respondents' counsel moved expeditiously and kept the State Board's counsel informed of its next move. The State Board's reliance on *Liddy v. Lamone*, 398 Md. 233, 244 (2007), *Baker v. O'Malley*, 217 Md. App. 288, 296 (2014) and *Lamone v. Schlakman*, 451 Md. 468, 485 (2017) is misplaced.

In *Liddy v. Lamone*, Mr. Liddy challenged the qualifications of Douglas F. Gansler to serve as Attorney General. 398 Md. at 236, 919 A.2d at 1278. The challenge was filed eighteen (18) days before the general election and oral argument was heard in this Court five (5) days before the general election was to be held. *Id.* at 252. Notably, Liddy's challenge could have been brought at any point after Mr. Gansler filed his certification of candidacy on June 28, 2006—there was no reason to wait until 18 days before the general election. *Id.* at 253. Here, on the other hand, Mr. Oaks pleaded guilty to felony charges on March 29, 2018, and this action was

filed within ten (10) days thereafter. As of the date of oral argument in this matter, there will be fifty-five (55) days remaining before primary election. While the State Board is currently functioning ahead of its published schedule, the 2018 Gubernatorial Election Calendar designates May 2, 2018 as the date for certification of the ballot, and May 7, 2018, as the state date for printing ballots. (E. 117.) The time remaining before the primary election is a key difference between this case and *Liddy*, and goes to the significantly reduced prejudice to the State Board in this case.

Additionally, in *Liddy*, the State Board argued that the delay in seeking to challenge Mr. Gansler's qualifications prejudiced the electorate. *Id.* at 240 ("The appellees' paramount concern was the prejudice this action would have on the electorate and its choice of Attorney General candidates.") The Court determined that if Mr. Gansler's name were removed from the ballot, those individuals who had already cast absentee votes for him would be disenfranchised and the value of their votes diluted, as they would be unable to vote again. *Liddy*, 398 Md. at 255, 919 A.2d at 1290. Thus, in *Liddy*, at the request of the State Board, the prejudice to the electorate was considered, not just the prejudice to the State Board.

Here, if Mr. Oaks' name is not removed from the ballot, the very harm the Court sought to avoid in *Liddy* will take place. Voters in District 41 will cast votes for Mr. Oaks, and those votes will not count. Those individuals will be

disenfranchised and they will not have another opportunity to vote for a valid candidate.

The facts in *Baker v. O'Malley* are equally unavailing. There, a candidate for the Orphan's Court in Baltimore City brought suit against Governor O'Malley nearly two years after the subject election. 217 Md. App. 288, 298, 92 A.3d 588, 595 (2014). There was no such delay in this action.

Additionally, in *Lamone v. Schlakman*, the action was filed in Circuit Court approximately one month and five days after the plaintiffs became aware of the relevant facts. 451 Md. 468, 489, 153 A.3d 144, 156 (2017). Here, the action was filed within ten (10) days of learning that Mr. Oaks had pleaded guilty to two felony charges, and as set forth above and in Appellee's Brief, Respondents actively and aggressively moved this action forward. Laches should not be applied in this case.

II. The State Board Has Adequate Time to Reform the Two Ballots in Legislative District 41.

The judgment of the trial court on the evidence shall not be set aside unless clearly erroneous, and due regard must be given to the opportunity of the trial court to judge the credibility of the witnesses. Md. Rules, Rule 8-131(c). Judge Klavans had the opportunity to hear Ms. Natasha Walker's testimony regarding the increased challenges facing the State Board if it were ordered to remove Mr. Oaks' name from the ballots. As such, Judge Klavans was in a position to assess the demeanor-based credibility of Ms. Walker and decide which evidence to rely upon. *Attorney*

Grievance Com'n of Maryland v. Zimmerman, 428 Md. 119, 134, 50 A.3d 1205, 1214 (2012); *Consumer Protection Division v. Morgan*, 387 Md. 125, 197, 874 A.2d 919, 961 (2005). Having considered that testimony, Judge Klavans determined that it was possible for the State Board to remove Mr. Oaks' name from the ballot, and that the failure to do so would result in disenfranchisement of Maryland voters. (E. 41-42.)

Judge Klavans' conclusion based on the evidence presented is supported by provisions within the Election Law itself. For example, EL Title 5, Subtitle 9 sets forth the rules governing vacancies in candidacies occurring before the primary election. These provisions belie the State Board's contention that changes made now to the ballot for Legislative District 41 are impossible, or would somehow dismantle the entire primary election process for 2018.

EL §§ 5-903 and 5-904 speak to vacancies in the Lieutenant Governor and Governor positions that occur after the deadline for filing a certificate of candidacy for a primary election. If the Lieutenant Governor or Gubernatorial candidate dies or is disqualified less than 45 days before the primary election, the certificate of candidacy for the replacement candidate must be filed within five days following the death or disqualification. EL § 5-903(b)(2)(ii); § 5-904(c)(2)(ii). The only hard and fast deadline within these provisions is that a certificate of candidacy for a successor candidate for Lieutenant Governor or Governor may not be filed less than ten (10)

days before the primary election. EL § 5-903(b)(3); EL § 5-904(c)(3). Only if the Lieutenant Governor candidate dies or is disqualified less than ten (10) days before the primary election will that candidate appear on the ballot. EL § 5-903(c)(1); EL § 5-904(d)(1).

It is clear from these provisions that the State Board's ballot preparation process is able to incorporate changes to a primary ballot much closer to the election than we find ourselves today. Moreover, a change to the Lieutenant Governor or Governor candidate would affect every ballot in Maryland, not just those in Legislative District 41.

Judge Klavans' factual finding was correct. The timing may be "uncomfortable" for the State Board, but it is "adequate." (E. 42, E. 6.) Moreover, the public interest and the balance of convenience weighs heavily in favor of ordering the State Board to reform the two ballots at issue in this case.

CONCLUSION

For the reasons stated above and in Appellee's Brief, Respondents urge this Court to affirm the Circuit Court's granting of a preliminary injunction in this matter requiring the State Board to remove Mr. Oaks' name from the ballots in Legislative District 41.

May 1, 2018

/s/ H. Mark Stichel
H. MARK STICHEL
CLIENT PROTECTION FUND NO.
8312010443
ELIZABETH A. HARLAN
CLIENT PROTECTION FUND N.
1101050005
ASTRACHAN GUNST THOMAS, P.C.
217 EAST REDWOOD STREET, 21ST FLOOR
BALTIMORE, MARYLAND 21202
TELEPHONE: 410-783-3547
FACSIMILE: 410-783-3530
HMSTICHEL@AGTLAWYERS.COM
EHARLAN@AGTLAWYERS.COM

ATTORNEY FOR RESPONDENTS/APPELLEES

STATUTORY APPENDIX

Md. Code Ann., Elec. Law § 5-903.

(a)

(1) If a candidate for Lieutenant Governor dies, withdraws the candidacy, or becomes disqualified for any reason after the deadline for filing a certificate of candidacy for a primary election under § 5-303 of this title, the remaining candidate for Governor of that unit may designate a successor candidate for Lieutenant Governor.

(2) Provided the successor candidate for Lieutenant Governor files a certificate of candidacy in accordance with subsection (b) of this section, the name of the successor candidate for Lieutenant Governor shall appear on the ballot.

(b)

(1) The successor candidate for Lieutenant Governor designated by the candidate for Governor under subsection (a) of this section shall file a certificate of candidacy with the State Board.

(2) The certificate of candidacy shall be filed:

(i) by the fifth day following the withdrawal deadline specified under § 5-502 of this title, if the former Lieutenant Governor candidate files a certificate of withdrawal;

(ii) by the fifth day following the death or disqualification of the former Lieutenant Governor candidate, if that former candidate dies or is disqualified less than 45 days before the day of the primary election;
or

(iii) not later than 40 days before the day of the primary, if the former Lieutenant Governor candidate dies or is

disqualified 45 days or more before the day of the primary election.

(3) A certificate of candidacy for a successor candidate for Lieutenant Governor under subsection (b)(2)(ii) of this section may not be filed less than 10 days before the day of the primary election.

(c) If the death or disqualification of a former Lieutenant Governor candidate occurs less than 10 days before the day of the primary election, the existing Governor and Lieutenant Governor unit whose filing is complete:

(1) shall remain on the ballot; and

(2) if nominated, a vacancy in the nomination of the candidate for Lieutenant Governor shall be declared and be filled under § 5-1005(b) of this title as if the death or disqualification had occurred after the primary election.

Md. Code Ann., Elec. Law § 5-904.

(a) This section does not apply if only one Governor and Lieutenant Governor unit files a certificate of candidacy for the nomination of a political party for those offices in a primary election.

(b)

(1) If a candidate for Governor dies, withdraws the candidacy, or becomes disqualified for any reason after the deadline for filing a certificate of candidacy for a primary election under § 5-303 of this title, the remaining candidate for Lieutenant Governor of that unit may:

(i) designate the Lieutenant Governor candidate as the successor candidate for Governor and appoint a successor candidate for Lieutenant Governor; or

(ii) designate a successor candidate for Governor.

(2) The names of any Governor and Lieutenant Governor candidate unit that is designated under paragraph (1) of this subsection shall be listed jointly on the primary election ballot.

(c)

(1) The successor candidate for Governor designated by the Lieutenant Governor candidate under subsection (b)(1)(ii) of this section, or the former candidate for Lieutenant Governor who subsequently is designated as the candidate for Governor together with the candidate appointed as the successor candidate for Lieutenant Governor under subsection (b)(1)(i) of this section, each shall file a certificate of candidacy with the State Board.

(2) The certificate of candidacy shall be filed:

(i) by the fifth day following the withdrawal deadline specified under § 5-502 of this title, if the former candidate for Governor files a certificate of withdrawal;

(ii) by the fifth day following the day of the death or disqualification of the former candidate for Governor, if that former candidate dies or is disqualified less than 45 days before the day of the primary election; or

(iii) not later than 40 days before the day of the primary election, if the former candidate for Governor dies or is disqualified 45 days or more before the day of the primary election.

(3) A certificate of candidacy may not be filed under paragraph (2)(ii) of this subsection less than 10 days before the day of the primary election.

(d) If the death or disqualification of a former candidate for Governor occurs less than 10 days before the day of the primary election, the existing Governor and Lieutenant Governor unit whose filing is complete:

(1) shall remain on the ballot; and

(2) if nominated, a vacancy in the office of Governor shall be declared and filled under § 5-1005 of this title as if the death or disqualification had occurred after the primary election.

Md. Rule 8-131(c).

(c) Action Tried Without a Jury. When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

Certification of Word Count and Compliance with Rule 8-112

1. This brief contains 2,614 words, excluding the parts exempted from the word count by Rule 8-503.

2. This document complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ H. Mark Stichel
H. Mark Stichel

Rule 20-201 Certification

Pursuant to Rule 20-201(f), I certify that this document does not contain any restricted information.

/s/ H. Mark Stichel
H. Mark Stichel

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of May 2018, a copy of the foregoing Appellee's Reply Brief was filed and served electronically on the MDEC system and sent by electronic mail to:

Julia Doyle Bernhardt
Andrea W. Trento
Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
jbernhardt@oag.state.md.us
atrento@oag.state.md.us
(410) 576-6472
(410) 576-7036 (facsimile)

Attorneys for Appellant/Petitioner

/s/
H. MARK STICHEL

ATTORNEY FOR APPELLEES/RESPONDENTS