IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2012

No. 100

GREGORY HALL, *et al.*,

Appellants,

v.

PRINCE GEORGE'S COUNTY
DEMOCRATIC CENTRAL COMMITTEE, *et al.*,

Appellees.

On Appeal from the Circuit Court for Prince George's County
(Honorable C. Philip Nichols, Jr., Judge)
Pursuant to Writ of Certiorari to the Court of Special Appeals of Maryland

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BRIEF OF APPELLEE PRINCE GEORGE'S COUNTY DEMOCRATIC CENTRAL COMMITTEE

JOSEPH E. SANDLER
ELIZABETH F. GETMAN
SANDLER, REIFF, YOUNG & LAMB, P.C.
1025 Vermont Ave., N.W. Suite 300
Washington, D.C. 20005
(202) 479-1111
sandler@sandlerreiff.com
getman@sandlerreiff.com

Attorneys for Appellee Prince George's County Democratic Central Committee

December 27, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

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STATEMENT OF THE CASE

Under the Maryland Constitution, Article III, § 13(a)(1), if a vacancy occurs in a House of Delegates seat, the County Central Committee of the political party of the Delegate who vacated the seat is to submit to the Governor the name of a person to fill the vacancy. The Constitution confers virtually unlimited discretion on the Central Committee in selecting that person, as long as he or she is legally qualified for the office.

The County Central Committee is to submit a name to the Governor within thirty days of the occurrence of the vacancy, and the Governor is to appoint that person within fifteen days of submission of the name. *Id*.

In this case, Appellant Gregory Hall misled Appellee Prince George's County Democratic Central Committee (the "County Central Committee" or "Committee") about his background and qualifications, and the Committee submitted his name to the Governor before the relevant facts became known. Before the Governor took any action on the recommendation, the County Central Committee met to withdraw Mr. Hall's name, and would have done so on November 20, 2012 and again on November 26, 2012, but for the filing by Mr. Hall himself of the action in the Circuit Court.

Mr. Hall has been attempting to use this litigation to force the County Central Committee to *make a decision that it does not want to make*: appointing Mr. Hall to fill the vacancy. Yet, the power to make that decision is conferred, by the Maryland Constitution, on the County Central Committee—*not* on Mr. Hall. Indeed, Mr. Hall is effectively attempting to use the Courts to compel the County Central Committee to award him the great privilege of a seat in the General Assembly—a seat to which he has never been elected and to which he has no legal claim or entitlement whatsoever.

Specifically, in this case, a vacancy in the House of Delegates from the 24th Legislative District occurred on October 9, 2012. The County Central Committee met on November 2, 2012 to consider who should be appointed to fill the seat. At that meeting, Appellant Gregory Hall misled the County Central Committee about his background and qualifications. On November 7, 2012, the County Central Committee submitted Mr.

Hall's name to the Governor. On November 16, after additional information became known about Mr. Hall, but *before* expiration of the 15-day period for the Governor to act on the submission of the name, and *before* the Governor had taken any such action, the Governor asked the County Central Committee to withdraw Mr. Hall's name. (E 80).

On November 20, 2012—which was still *before* expiration of the 15-day period for the Governor to act on the submission of the name, and *before* the Governor had taken any action, the County Central Committee met to withdraw Mr. Hall's name from the Governor. (E 86). On that day, however, Mr. Hall filed a Verified Complaint for Temporary Restraining Order and Preliminary and Permanent Injunction in the Circuit Court to block the County Central Committee from withdrawing Mr. Hall's name. (Brief of Appellant Gregory Hall ("Hall Br.") at 1). Immediately prior to the meeting, the Circuit Court issued a show cause order, with a date and time for a hearing to be set. (E 4, Dkt Entry for Nov. 20, 2012). The County Central Committee then voted at its meeting to hold the Governor's request to withdraw the name in abeyance pending the outcome of the show cause hearing. (Hall Br. at 2; E 265 (Affidavit of Terry Speigner, Chair of the Prince George's County Democratic Central Committee ("Speigner Aff.") ¶ 15)).

The Chair of the County Central Committee called another meeting for the evening of November 26, 2012 to consider further the question of withdrawing Mr. Hall's name. (E 135). Prior to that meeting, Mr. Hall filed another motion for a temporary restraining order to block the Committee from acting. (Hall Br. at 2). At a hearing on that motion on the afternoon of November 26, the parties agreed, and the

Circuit Court ordered, that "in order to preserve the status quo pending a hearing on the merits," the County Central Committee "shall not take any binding action concerning a withdrawal of Mr. Hall's name" unless and until the Circuit Court issued a ruling. (E 183). The County Central Committee adopted a resolution at that meeting that it was "the sense of the Committee" that Mr. Hall's name should be withdrawn. (E 266, Speigner Aff. ¶ 19).

The parties to the Circuit Court action filed cross-motions for summary judgment and the Circuit Court heard argument on December 4, 2012. The Circuit Court issued its opinion the next day, December 5, 2012, holding that the County Central Committee had, as of November 26, 2012, and continues to maintain, the right to withdraw Mr. Hall's name unless and until the Governor actually appoints him. (E 347-372). On December 6, 2012, Mr. Hall filed a notice of appeal with the Court of Special Appeals and a Petition for Writ of Certiorari with this Court. This Court granted the Petition for Writ of Certiorari on December 13, 2012.

QUESTIONS PRESENTED

1. Under Article III, § 13(a)(1) of the Maryland Constitution, did the Prince George's County Democratic Central Committee have the right to withdraw a name previously submitted to the Governor after expiration of the thirty-day period for submitting the name but prior to expiration of the fifteen-day period for the Governor to act?
2. If so, should the situation be treated as if the County Central Committee did withdraw the name on November 20, 2012, indisputably within the 15-day period,

given that it would have withdrawn the name on that date but for the filing of the Circuit Court action by Mr. Hall?

3. If not, did the County Central Committee nevertheless maintain the right to withdraw Mr. Hall's as of November 26, 2012?
4. Did the Circuit Court correctly refuse to strike the Affidavit of County Central Committee Chair Terry Speigner, which expressly affirmed that the affiant has "personal knowledge" of the factual assertions contained in the affidavit?

STATEMENT OF FACTS

On October 10, 2012, Speaker of the House of Delegates Michael E. Busch announced that he would follow advice he had received from the Attorney General's Office concluding that Delegate Tiffany Alston (D-Prince George's), representing the 24th Legislative District, had been suspended from office without pay or benefits by operation of law, and took steps necessary to suspend such pay and benefits. (Hall Br. at 5). On November 1, 2012, the Attorney General's Office issued advice to the Speaker concluding that Ms. Alston had been permanently removed from office by operation of law, effective as October 9, 2012. (E 42-51).

On November 2, 2012, the County Central Committee held a meeting at which it considered the question of which name to submit to the Governor under Article III, § 13(a)(1) of the Maryland Constitution with respect to the vacant 24th Legislative District Seat. (E 262, Speigner Aff. ¶ 4). At that meeting, the County Central Committee heard presentations from several individuals who had applied to be considered by the Committee to fill the vacancy. (*Id.*).

Among those individuals was the Appellant, Gregory Hall. Along with other candidates for consideration, Mr. Hall was asked by a Committee member whether there was anything troublesome or questionable in his background that the Committee should know. Mr. Hall answered only that he made some mistakes as a youth and got in trouble by mixing with the wrong crowd. (E 262, Speigner Aff. ¶ 5). In particular, Mr. Hall failed to disclose what became known to the Committee only after November 7: that Mr. Hall had been involved in the shooting death of a thirteen-year old child and had been convicted of unlawful gun possession in that incident; that he had unpaid state taxes; that he had repeatedly been ordered to pay overdue child support; and, that he had misrepresented his ownership of a business. (E 262-63, Speigner Aff. ¶ 6; *State v. Gregory Antoine Hall*, Case No. CT921107B (Cir. Ct. Prince George's County)). Mr. Hall failed to bring any of that information to the attention of the County Central Committee during the November 2, 2012 meeting. (E 62-63, Speigner Aff. ¶ 6).

On November 7, 2012, the County Central Committee submitted to the Governor, in writing, the name of Gregory Hall to fill the vacancy in the 24th Legislative District. (Hall Br. at 6). On November 8, 2016, the *Washington Examiner* newspaper reported that:

> Hall's much longer rap sheet is a problem. It's not just that the former president of the county's Young Democrats has been convicted of failure to obey traffic signals, driving with an expired vehicle registration and failure to properly restrain a child under the age of 16. Hall also admits that he faced much more serious drug and handgun possession charges in the 1990's.
>
> According to Maryland court records and contemporaneous news reports, he was charged with murder in 1992. A 13-year old bystander was shot accidentally during what police characterized as a gunfight over a drug dispute between Hall

> and another man. Hall was jailed for 40 days and then charged instead with gun possession.

Editorial, *P.G. Dems go from frying pan into fire*, WASHINGTON EXAMINER, Nov. 8, 2012 (E 263, Speigner Aff. ¶ 8). On November 16, 2012, the *Washington Post* reported that Mr. Hall had been "a crack dealer who took part in a gun battle that killed a seventh-grade honors student as he and his family left a church service in Capitol Heights. . . . Hall was initially charged with murder in the 1992 shootout that killed a 13-year old boy in the crossfire… But the charge was withdrawn after tests showed the fatal bullet had come from the gun of another man with whom Hall was feuding… Hall was convicted separately on a misdemeanor gun charge." A. Marimow, *Prince George's pick to replace Tiffany Alston has his own troubled past*, WASH. POST, Nov. 16, 2012 (E 263-64, Speigner Aff. ¶ 9). Mr. Hall also had not disclosed to the County Central Committee, prior to November 7, 2012, that he had repeatedly been ordered by the Prince George's County Circuit Court to pay child support for which he was in arrears. (E 264, Speigner Aff. ¶ 10).

On November 16, 2012, Governor O'Malley sent a letter to the Committee asking the Committee to withdraw its submission of Mr. Hall's name to fill the vacancy in the 24th Legislative District and to take no further action until the Governor received a formal opinion from the Office of the Attorney General. (E 81).

On November 17, 2012, the County Central Committee added an action item to its agenda for a regularly scheduled meeting to be held on November 20, 2012 entitled "Withdrawal of District 24 nomination to Governor." (E 85).

On November 20, 2012, the Attorney General issued a formal opinion to the Governor that the House of Delegates seat held by Ms. Alston was vacated as of October 9, 2012 when Ms. Alston was removed from office by operation of law. (E 122-33, 97 Op. Atty Gen. __ (2012)). That opinion was issued only hours before the County Central Committee meeting took place. (Circuit Court Opinion & Order at 9, E 350). At the same time, the Attorney General's Office issued a letter of advice to Delegate Jolene Ivey (D-Prince George's) finding that the County Central Committee had the power to withdraw Mr. Hall's name, even after expiration of the 30-day period following the existence of the vacancy, but that if the Committee submitted a new name, that new recommendation would not be binding on the Governor. (E 248-52).

On November 20, 2012, hours before the County Central Committee was scheduled to meet, Mr. Hall filed a Verified Complaint for Temporary Restraining Order and Preliminary and Permanent Injunction, together with a Motion for Temporary Restraining Order, seeking to block the County Central Committee from acting on the withdrawal of Mr. Hall's name. (Hall Br. at 1). The Circuit Court held an emergency hearing and the Court granted an order to show cause, with a hearing date and time to be set. (E 4 (Docket Entry); Hall Br. at 1-2).

The County Central Committee then held its meeting, that evening. The Committee was informed of the issuance of the Attorney General's formal opinion concerning the alleged vacancy of the seat and the Attorney General's conclusion that the seat was vacant as of October 9, 2012. (E 265, Speigner Aff. ¶ 15). The Committee was also informed that Mr. Hall had commenced this lawsuit, that Mr. Hall had filed a motion

for a temporary restraining order, that a hearing on Mr. Hall's request had taken place earlier that day in the Circuit Court (*id*.), and that the Circuit Court had granted an order to show cause with a hearing date and time to be set). The County Central Committee then voted 12-8 to hold in abeyance any action on Governor O'Malley's request to withdraw the submission of Mr. Hall's name until a show cause hearing was held by the Circuit Court. (Hall. Br. at 2; E 265, Speigner Aff. ¶ 15). The County Central Committee would clearly have voted to withdraw Mr. Hall's name that evening but for the legal proceedings initiated in the Circuit Court by Mr. Hall earlier in the day. (E 265, Speigner Aff. ¶ 16).

On Saturday evening, November 24, 2012, the County Central Committee Chair, Terry Speigner, sent an e-mail to Committee members, calling an emergency meeting for November 26, the following Monday. (E 135). Hours before that meeting, Mr. Hall filed a Verified Amended Complaint for Temporary Restraining Order and Preliminary and Permanent Injunction against the County Central Committee and added Governor O'Malley as a defendant. (E 4, 13; Hall Br. at 2). At a hearing that afternoon, November 26, on Mr. Hall's motion for a TRO, the parties stipulated, and the Circuit Court ordered that, "in order to preserve the status quo pending a hearing on the merits," the County Central Committee "shall not take any binding action concerning a withdrawal of Mr. Hall's name" unless and until the Circuit Court issued a ruling. (E 183; *see* Circuit Court Opinion & Order at 9, E 350). The parties further stipulated, and the Circuit Court ordered that, "Mr. Hall will be estopped from arguing that (a) that the Central Committee is precluded from voting to withdraw his name because it did not do so on November 26,

2012; or (b) that Governor O'Malley is required to appoint Mr. Hall because the Central Committee did not withdraw his name on November 26, 2012." (E 184).

At its meeting that evening, the County Central Committee adopted a resolution, by a vote of 20-1, that it was "the sense of the Committee" that Mr. Hall's name should be withdrawn. (E 266, Speigner Aff. ¶ 19).

ARGUMENT

I. STANDARD OF REVIEW

The parties agree that there are no genuine disputes of material fact in this case. (Hall. Br. at 11). In such a situation, in reviewing a Circuit Court order granting summary judgment, "this Court 'determines whether the Circuit Court correctly entered summary judgment as a matter of law.'" *Whitley v. Md. State Board of Elections*, 429 Md. 132, 148 (2012) (quoting *Anderson v. Council of Unit Owners of the Gables on Tuckerman Condo*, 404 Md. 560, 571 (2008)). Here, the issue of law is the correct interpretation and application of Md. Const., Art. III, § 13(a) in the unusual circumstances of this case.

Although Mr. Hall repeatedly insists that resolution of this issue is governed by the plain meaning of the words "shall" and "duty" in Article III, § 13(a)(1) (Hall Br. at 13-16), this Court has made clear that "'results that are unreasonable, illogical or inconsistent with common sense should be avoided whenever possible consistent with the statutory language, with the real legislative intention prevailing over the intention indicated by the literal meaning.'" *Bernstein v. State*, 422 Md. 36, 46 (2011) (quoting *State v. Fabritz*, 276 Md. 416, 422 (1975)). "'Adherence to the meaning of words does

not require or permit isolation of words from their context since the meaning of the plainest words in a statute may be controlled by the context. . . . .'" *Id*. (*quoting Comptroller v. Mandel, Lee, Goldstein, Burch Re-Election Committee*, 280 Md. 575, 579 (1977)). In this case, the "real legislative intention" of Md. Const. Art. III, § 13(a)(1) is to confer on the applicable County Central Committee the power to select a person to fill a vacancy in the House of Delegates. Mr. Hall's proposed interpretation—that the County Central Committee lost that power even before the Governor acted on the selection—is not only inconsistent with basic legal principles applicable to the appointment power, but would utterly frustrate accomplishment of that legislative objective.

II. THE COUNTY CENTRAL COMMITTEE HAD THE RIGHT TO WITHDRAW MR. HALL'S NAME AS OF NOVEMBER 20, 2012 AND DID NOT LOSE THAT RIGHT BY VIRTUE OF THE DELAY CAUSED BY MR. HALL'S OWN ACTIONS

Mr. Hall argues that, under Art. III, §13(a)(1), if the County Central Committee submits a name to the Governor within the allowable period for it to do so—"thirty days after the occurrence of the vacancy"—the Governor has a "mandatory duty" to appoint that person. (Hall. Br. at 13-15). Article III, § 13(a)(1) plainly states, however, that it "shall be the duty of the Governor to make said appointment *within fifteen days* after the submission thereof to him." *Id.* (emphasis added). Regardless of whether the fifteen-day provision is directory or mandatory, there can be no dispute that the Governor does not have *any* duty to appoint the person whose name is submitted *prior to* the expiration of that fifteen-day period.

In this case, Mr. Hall's name was submitted to the Governor on November 7, 2012 and the parties disagree about whether the 15-day period expired on November 24, 2012, as Mr. Hall contends (Hall Br. at 24), or on November 26, as Appellees contend below. There is no disagreement, however, that the fifteen-day period had *not* expired as of November 20, 2012. What happened in this case is that the County Central Committee was prepared to withdraw Mr. Hall's name on November 20, 2012 and would have done so but for Mr. Hall's own actions in filing a lawsuit and seeking a temporary restraining order or preliminary injunction in the Circuit Court.

The first question, then, is whether the County Central Committee had the power to withdraw Mr. Hall's name on November 20, after expiration of the 30-day period but before the Governor made any appointment. The answer to that question is yes. The next question is whether the Governor had any duty to appoint Mr. Hall *prior* to November 20 merely because the County Central Committee had submitted his name. The answer to that question is no, and had the County Central Committee withdrawn Mr. Hall's name on November 20, there would have been no name submitted to the Governor, and no name before him, on November 20, leaving him free, under Md. Const. Art. III, § 13(a)(2), to appoint whomever he wanted. The next question is whether the situation should be treated any differently because the County Central Committee failed to withdraw the name on November 20 solely by reason of Mr. Hall's own actions. The answer to that question must also be no, for the reasons explained below.

A. The County Central Committee Had Power to Withdraw Mr. Hall's Name After Expiration of the Thirty-day Period.

Mr. Hall contends that the County Central Committee lost the power to withdraw Mr. Hall's name after expiration of the thirty day period, because after expiration of that period, "the Committee has no further role in the process, be it to submit a name or to attempt to withdraw the name it submitted…." (Hall Br. at 22). That contention is incorrect.

First, Mr. Hall's appointment was never completed because the Governor never actually appointed him. The mere submission of Mr. Hall's name to the Governor by the County Central Committee did not confer any office on Mr. Hall. His appointment could not be complete unless and until the Governor actually issued him a commission appointing him to the Delegate seat. "To constitute a valid appointment to office there must be some open, unequivocal act of appointment on the part of the officer or body empowered to make it." *Goodman v. Clark of Circuit Court for Prince George's County*, 291 Md. 325, 329 (1971). The Attorney General of Maryland has specifically ruled that "the signing of the commission [by the governor] was clearly necessary to complete the appointment" of an individual to fill a vacant seat in the House of Delegates. 62 Op. Atty. Gen. 453 (1977). That ruling is consistent with the principle, for example, that the appointment of a state official is not complete upon her mere nomination by the Governor, but only upon confirmation by the State Senate. *Dyer v. Bayne*, 54 Md. 87, 90 (1880).

In this case, Mr. Hall was not, in fact, appointed by the Governor to fill the House of Delegates seat. No commission has ever been issued. Mr. Hall's appointment was not completed as of November 20, 2012 and is not complete as of the present day.

Second, given that Mr. Hall's appointment was never completed, the County Central Committee had the right to withdraw his name, even after expiration of the 30-day period. It is well-established that, "[a]n appointment may be revoked or rescinded *at any time before it becomes final and complete*." 67 C.J.S. Officers § 64 (2012) (emphasis added). When one body or official has the power to nominate and another has the power to confirm or take other action to make the appointment effective, the nominating official clearly has the inherent right to withdraw the nomination until the confirmation is complete.

Mr. Hall argues that "[t]here is no language in Art. III, §13(a)(1) that would imply that the Central Committee may withdraw a name it submitted to the Governor for appointment after the expiration of thirty days. . . ." (Hall. Br. at 23). Such power, however, is necessarily inherent in the power to submit a name in the first place. For example, Article II, section 10 of the Maryland Constitution confers on the Governor the power to appoint senior state officials "with the advice and consent of the Senate." That provision does not expressly give the Governor the right to withdraw a nomination before the State Senate acts on it. Yet, the Governor clearly has that power. As the Attorney General of Maryland has ruled, "nothing prevents the Governor from withdrawing a nomination that has not been acted upon by the Senate." Opinion No. 87-021, 72 Op. Atty Gen. 274 (1987).

That conclusion is consistent with the holdings of those state courts that have considered the matter. "[W]here the nomination must be confirmed before the officer can take the office or exercise any of its functions, the power of removal is not involved and nominations may be changed at the will of the executive until title to the office is vested." *In re Commission on the Governorship*, 603 P.2d 1357, 1365 (Cal. 1979) (quoting *McChesney v. Sampson*, 23 S.W.2d 584, 586-87 (Ky. 1930)). *Accord*, *Cook v. Botelho*, 921 P.2d 1126, 1129 (Alaska 1996); *In re Advisory Opinion to the Governor*, 247 So.2d 428, 433 (Fla. 1971); *Burke v. Schmidt*, 191 N.W.2d 281, 284 (S.D. 1971); *McBride v. Osborn*, 127 P.2d 134,136-37 (Ariz. 1942).

Mr. Hall attempts to distinguish the situation of nominations on the basis that the State Senate may reject a nomination made by the Governor, while the Governor, in Mr. Hall's view, has only a "ministerial duty" to appoint any person whose name is submitted by the Central Committee and no discretion to reject that person. (Hall. Br. at 26-27). The issue, however, is not whether the confirming authority has the power to reject a nomination, but whether the *nominating authority* has the power to *withdraw* the nomination before the confirming authority acts on it, thereby vesting title in the office. As the Arizona Supreme Court explained in *McBride*, this power exists "whether sending the name to the senate for confirmation be treated merely as a nomination or as an appointment, because in neither instance would the act of the governor alone entitle his appointee to the office." 127 P.2d at 137.

In this case, the mere submission of Mr. Hall's name to the Governor by the County Central Committee did not entitle Mr. Hall to take office. It did not entitle him to

be sworn in as a Delegate, to enter the House chamber, to move into an office in the House Office Building or to start voting on legislation. Regardless of the nature of the Governor's obligation, or lack thereof, with respect to the submission of the name, the appointment could not be complete without the actual appointment being made by the Governor. That had not occurred as of November 20, 2012. As of that date, therefore, the County Central Committee clearly had the inherent authority and power to withdraw Mr. Hall's name.

B. Had the County Central Committee Withdrawn Mr. Hall's Name on November 20, the Governor Would Have Had No Duty to Appoint Him.

Regardless of whether the requirement that the Governor act within fifteen days is "directory," as the Circuit Court correctly held (E 367-70) or "mandatory," as Mr. Hall insists (Hall Br. 14-20), there can be no dispute that the Governor is not required to take any action *prior to* expiration of that fifteen-day period. Mr. Hall insists that the "Governor has no discretion in the appointment under Art. II, § 13(a)(a) and must perform his ministerial duty." (Hall Br. at 25). Section 13(a)(1) makes clear, however, that in no event can the Governor be required to perform any such duty, regardless of its nature, *before* the fifteen-day period expires.

The Governor violated no obligation by not appointing Mr. Hall prior to expiration of the fifteen-day period. Had the County Central Committee withdrawn Mr. Hall's name on November 20, then there would have been no name before the Governor—no name submitted to him—at that time. The County Central Committee could not submit another name, because the thirty-day period to do that had indeed expired. Thus, the

Governor would have been free under Art. III, § 13(a)(2) to appoint another person to fill the vacancy. Contrary to Mr. Hall's suggestion, therefore, the mere submission of the name could not "trigger[] the duty of the Governor to appoint that person" (Hall Br. at 23) prior to expiration of the fifteen day—if there was no name before the Governor at the earliest time he was required to act, then there could be no "duty" to do anything with that name.

In that regard, the process prescribed by Article III, § 13(a)(1) is not like a special election, as Mr. Hall contends. (Hall Br. at 23-24). That a voter in an election may not withdraw his vote after casting it says nothing about the very different process set out in Article III, § 13(a)(1). As Mr. Hall's own Brief demonstrates, in enacting the current language of that constitutional provision in 1935, the General Assembly intended to *replace* the special election process with a process conferring the power to select a replacement on the party Central Committee of the party to which the person vacating the office belonged. (Hall Br. at 17-18). Mr. Hall did not win any special election, or any popular election at all, and there is, accordingly, no comparison between the Governor's obligation under section 13(a)(1) and the Governor's duty to issue a commission to the winner of an election. (Hall. Br. at 24). If the General Assembly wanted to treat the new process like a special election, it could simply have continued to provide for a special election by leaving in place the original language of the 1867 Constitution.

Indeed, interpreting section 13(a)(1) to require the Governor to appoint a name submitted by the Central Committee even if the Central Committee withdraws that name before the earliest date Governor is required to act, would fly in the fact of the manifest

legislative intent of this provision. As Mr. Hall himself explains, the language of this provision was amended to require that only one name be submitted by the Central Committee to the Governor, thereby conferring the appointment power *solely* on the Central Committee. (Hall Br. at 18-19 & App. 17-18, 32-33). Mr. Hall is absolutely correct that the purpose of this provision is to confer on the Central Committee the power to select the person to fill the vacancy. The problem is that Mr. Hall's position would actually *deprive* the Central Committee of that power by forcing the Governor to appoint someone the Central Committee does not want appointed, even if the Central Committee makes its choice clear before the earliest time the Governor is required to act.

That is what would have happened in this case had the County Central Committee withdrawn Mr. Hall's name on November 20, that is, before the *earliest* time the Governor was required to act: the County Central Committee would have made clear its choice that it did not want Mr. Hall to fill the vacancy. Under those circumstances, clearly the Governor would not have been entitled, let alone obligated, to appoint him.

C. The Situation Should Be Treated as If the County Central Committee Had Withdrawn Mr. Hall's Name on November 20.

The final question, at this stage of the analysis, is whether the situation should be regarded any differently because the County Central Committee did not, in fact, withdraw Mr. Hall's name on November 20. The answer is no.

The information about Mr. Hall's background became public after the County Central Committee submitted Mr. Hall's name on November 7. (E 263-64). On November 16, the Governor sent a letter to the County Central Committee requesting

them to withdraw Mr. Hall's name. (E 81). The County Central Committee was already scheduled to meet on November 20. On November 17, 2012, the County Central Committee added an action item to its agenda for a regularly scheduled meeting to be held on November 20, 2012 entitled "Withdrawal of District 24 nomination to Governor." (E 85). Hours before that meeting, Mr. Hall filed his complaint and motion for TRO, seeking to block the County Central Committee from acting on the withdrawal of Mr. Hall's name. (Hall Br. at 1). The Circuit Court held an emergency hearing and the Court granted an order to show cause, with a hearing date and time to be set. (E 4 (Docket Entry); Hall Br. at 1-2). The County Central Committee, after being informed about the Circuit Court proceedings, then voted 12-8 to hold in abeyance any action on Governor O'Malley's request to withdraw the submission of Mr. Hall's name until a show cause hearing was held by the Circuit Court. (Hall. Br. at 2).

These circumstances make clear that the County Central Committee would have voted to withdraw Mr. Hall's name that evening but for the legal proceedings initiated, in the Circuit Court, by Mr. Hall earlier in the day. Further, County Central Committee Chair's affidavit states that based on his own discussions with Committee members, he is confident that, but for Mr. Hall's lawsuit, the Committee would have voted to withdraw Mr. Hall's name that night. (E 265, Speigner Aff. ¶ 16). Neither Mr. Hall's own affidavit (E 187-93) nor any other evidence submitted by Mr. Hall in support of his motion for summary judgment contradict this factual assertion.

In these circumstances, the situation should be treated as if the County Central Committee had in fact withdrawn Mr. Hall's name on November 20—before the earliest

time the Governor had to act. "'[W]here one party has by his representations or conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage." *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 234 (1959). The only reason the County Central Committee did not act to withdraw Mr. Hall's name on the evening of November 20 was to respect the jurisdiction of the Circuit Court, which, in response to Mr. Hall's actions that afternoon in filing suit and moving for a TRO, had granted an order to show cause and indicated that a hearing on that order would be set. Mr. Hall's *own actions* in filing the suit and a motion for TRO thus caused the County Central Committee to delay taking the action it otherwise planned to take that evening. Surely Mr. Hall should not be permitted to benefit from a delay caused by his own actions.

For these reasons, the Court should find that the County Central Committee had the power to withdraw Mr. Hall's name on November 20, 2012; that the Governor was not required to appoint Mr. Hall before that time; and that the County Central Committee did not lose that power by virtue of the delay in exercising it caused by Mr. Hall's filing of his lawsuit and motion for temporary restraining order, and the Circuit Court's consequent grant of an order to show cause.

III. THE COUNTY CENTRAL COMMITTEE HAD THE RIGHT TO WITHDRAW MR. HALL'S NAME AS OF NOVEMBER 26, 2012

The parties stipulated, and the Circuit Court ordered, that in order to preserve the status quo, the County Central Committee would not take binding action to withdraw Mr.

Hall's name at its emergency meeting on November 26, which had been called for that express purpose, but that Mr. Hall would be estopped from arguing that the County Central Committee was precluded from withdrawing his name because it did not do so on November 26. (E 184). In other words, the parties have stipulated that if the County Central Committee had the right to withdraw Mr. Hall's name as of November 26, it has the right to do so now.

As demonstrated in section II(A) above, the County Central Committee had the right to withdraw Mr. Hall's name after expiration of the thirty-day period as long as the Governor had not appointed him. If the situation is not treated as if the County Central Committee had in fact withdrawn Mr. Hall's name on November 20, the issue would then be whether the Governor was legally required to appoint Mr. Hall before November 26. If not, then the County Central Committee retains the right to withdraw his name now.

Mr. Hall contends that the Governor was legally required to appoint Mr. Hall *before* November 26, because (i) the fifteen-day period expired no later than November 24, 2012; and (ii) the Governor had an absolute duty to appoint Mr. Hall prior to that date. (Hall Br. at 27-30). Neither proposition has merit.

A. The Fifteen-Day Period Did Not Expire Until November 26, 2012.

Mr. Hall concedes that the "Maryland Constitution contains no provision instructing how time is to be computed under its provisions." (Hall Br. at 28). He nevertheless argues that the latest date on which the fifteen-day period could have expired was Saturday, November 24, by application of Md. Code Ann. Art. 1, § 36. That provision states that if the last day of a period occurs on a Sunday or legal holiday, the

period "runs until the end of the next day, which is neither a Sunday or a holiday." *Id.* In this case, Mr. Hall reasons, the fifteen-day period would have expired on Friday November 23, 2012, which was a legal holiday in Maryland ("American Indian Heritage Day"); and therefore, the fifteen-day period actually did expire on Saturday November 24. (Hall Br. at 30).

Md. Code. Ann., Art. 1 § 36 does *not*, by its terms, apply to computation of time under the Maryland Constitution. Rather, it applies only to computation of time allowed by "any applicable *statute*." To the extent Mr. Hall is suggesting that provision be applied by analogy, there would be no reason why it would not be equally appropriate to apply, by analogy, Md. Rule 1-203(a), which provides that in "computing any period of time prescribed by these rules, by rule or order of court or by any applicable statute . . . [t]he last day of the period so computed is included unless: (1) it is a *Saturday*, Sunday or holiday, in which even the period runs until the end of the net day *that is not a Saturday*, Sunday or holiday." (emphasis added). In that regard, the Attorney General of Maryland has taken the position that time periods under the Constitution should be interpreted in accordance with the broad common law principle that "events required to take place on a day that is designated by statute as a legal holiday are to occur on the *next business day* instead." Letter of Advice to T. Michael Scales, Feb. 12, 1998 (E 230-31) (quoting 79 Op. Atty Gen 438 (1994) (E 226-28) (emphasis added). Application of that general principle makes sense given that most agencies of State Government are not generally open for business on Saturdays. *Cf.* Md. Code. Ann., State Pers. & Pens. § 9-204(b)(1)

(if state employee holiday falls on Saturday, holiday leave must be taken on the preceding Friday).

In this case, the next business day after Friday November 23 was Monday, November 26. The Governor, therefore, if he was obligated at all to appoint Mr. Hall, was certainly not obligated to do so before November 26, 2012. As of November 26 then, the Governor had not appointed anyone to fill the vacancy and was not yet obligated, until the end of that day, to appoint anyone. For the same reasons as those set forth in section II above, the County Central Committee had the right to withdraw Mr. Hall's name on that day.

B. The 15-Day Period Is Directory Rather Than Mandatory.

Even if the fifteen-day period set forth in Md. Const. Art. III, § 13(a)(1) expired on Saturday November 24 rather than Monday, November 26, the appropriate legal consequence surely would *not* be to compel the Governor to appoint Mr. Hall. Mr. Hall relies on the use of the words "shall" and "duty" in the last phrase of section 13(a)(1): "it shall be the duty of the Governor to make said appointment within fifteen days after the submission thereof to him." (Hall Br. at 14).

In construing the Constitution, however, "'[a]dherence to the meaning of words does not require or permit isolation words from their context" and "results that are unreasonable, illogical or inconsistent with common sense should be avoided whenever possible consistent with the statutory language, with *the real legislative intention prevailing* over the intention indicated by the literal meaning.'" *Bernstein*, 422 Md. at 46 (quoting *Mandel, Lee, Goldstein, Burch Re-Election*, 280 Md. at 579-80) (emphasis

added). Specifically, "[t]he question of whether a statutory provision using the word 'shall' is mandatory or directory 'turns upon the intention of the Legislature as gathered from the nature of the subject matter and the purposes to be accomplished.'" *Resetar v. State Board of Education*, 284 Md. 537, 547 (1979) (quoting *Hitchins v. City of Cumberland*, 215 Md. 315, 323 (1958)). That approach is consistent with the generally recognized doctrine that, "There is no universal rule by which directory provisions may, under all circumstances, be distinguished from those which are mandatory. The intent of the legislature, however, should control, and no formalistic rule of grammar or word form should stand in the way of carrying out legislative intent." 1A SUTHERLAND ON STATUTORY CONSTRUCTION §25:3 (7th ed. 2012).

Here, Mr. Hall himself correctly identifies the two principal purposes of Md. Const. Art. III, § 13(a)(1): first, "to promptly fill a vacancy in the House of Delegates," by providing for appointment rather than the holding of a special election (Hall Br. at 17); and second, "to eliminate the Governor's discretion in the selection of the appointee to fill the vacancy and to maintain political party lines in the Legislature." (*Id*. at 18). In other words, the "real legislative intention" of this provision is to fill a vacancy promptly through appointment rather than special election and to confer on the County Central Committee, exclusively, the power to select the person to be so appointed.

Both purposes would be defeated by interpreting section 13(a)(1) as inflexibly mandating the Governor to appoint Mr. Hall within fifteen days of the date on which the County Central Committee submitted Mr. Hall's name. First, it makes no sense to interpret the language of this provision to deprive the Prince George's County

Democratic Central Committee of its exclusive power to select the person to be appointed, by forcing the Governor to appoint someone that the County Central Committee *does not want to be appointed*—namely, Mr. Hall. Second, if the Governor cannot be compelled to appoint Mr. Hall, and cannot appoint anyone else after expiration of the fifteen-day period, the other purpose of the constitutional provision—to fill the vacancy promptly—would likewise be defeated. As the Attorney General reasoned in finding that the fifteen-day period specified in Art. III, § 13(a)(2) is directory and not mandatory, notwithstanding use of the word "shall":

> [I]f the 15-day provision is viewed as mandatory in nature, it would appear that the Governor would lack the power to make the appointment, that no one else would have that power and that the vacancy would remain unfilled for the duration of the term. We do not believe that such a result was intended by the Framers of the constitutional provision.

62 Op. Atty Gen. 453, 462 (1977) (E 238).

Either result—forcing the County Central Committee to appoint someone it does not wish to appoint or forcing the Governor to leave the seat vacant through 2014--would be manifestly "unreasonable, illogical, . . . inconsistent with common sense" and utterly contrary to the "real legislative intention." *Bernstein*, 422 Md. at 46 (internal citations omitted). For that reason, the words "shall" and "duty" cannot and should not be interpreted to require the Governor to appoint Mr. Hall, even if the fifteen-day period expired prior to November 26, 2012.

IV. THE CIRCUIT COURT PROPERLY DECLINED TO STRIKE THE AFFIDAVIT OF PRINCE GEORGE'S COUNTY DEMOCRATIC CENTRAL COMMITTEE CHAIR TERRY SPEIGNER

In support of its Motion for Summary Judgment, the Committee submitted an affidavit of its Chair, Terry Speigner. (E 261-67). Mr. Speigner's Affidavit begins with his statement that, "I am over the age of eighteen (18) years, *competent to testify to the matters set forth herein* and have *personal knowledge* of the following matters . . . " (emphasis added). Clearly, on its face, his affidavit fully complies with the requirements of Md. Rule 2-501(c) that an affidavit supporting a motion for summary judgment "shall be made upon personal knowledge, . . . and shall show affirmatively that the affiant "is competent to testify to the matters stated in the affidavit."

Mr. Hall contends that the affidavit was insufficient because the oath set forth at the end states that the "foregoing matters and facts and true and correct to the best of my knowledge, information and belief." (Hall. Br. at 31-32, citing Speigner Aff. E 267). Md. Rule 1-304 provides that the phrase "to the best of my knowledge, information and belief" is a sufficient oath for affidavits *in general*. The committee note for Rule 1-304 then specifically states that "[t]his Rule is not intended to abrogate the *additional* requirements for summary judgment set forth in Rule 2-501" (emphasis added). To be sure, on a motion for summary judgment, affidavits that are based merely "on 'the best of one's knowledge, information, and belief,' or similar attestation, are insufficient . . . ." C*ounty Com'rs of Caroline County v. J. Roland Dashiell & Sons, Inc.*, 358 Md. 83, 103 (2000). Rather, in addition to the language above, the affidavit "must contain language that it is made on 'personal knowledge,' in order for it to be sufficient to sustain a motion

for summary judgment." *Id.* As this Court has observed, "[i]n other words, an affiant must attest to personal knowledge of the facts asserted and a basis for that knowledge." *Great Atl. & Pac. Tea Co., Inc. v. Imbraguglio*, 346 Md. 573, 598 (1997) (citing *A.J. Decoster Co. v. Westinghouse Electric Corp.*, 333 Md. 245, 263 (1994)).

It logically follows, then, that the oath provided in Md. Rule 1-304 is sufficient for a motion for summary judgment when the requirements of Md. Rule 2-501(c) are *also* satisfied—that is, when the affiant specifically states, under oath, *in the affidavit*, that he is competent to testify and that the statements made in the affidavit are based on personal knowledge. *Compare* Md. Rule 1-304 *with* Md. Rule 2-501(c). Mr. Speigner's affidavit clearly satisfies this standard. In it, he expressly and specifically states under oath that that the affidavit is made on his personal knowledge and that he is competent to testify to the facts set forth in the affidavit.

In that regard, it should be noted that the second form of oath contained in Md. Rule 1-304—the one Mr. Hall evidently believes must be used at the end of any affidavit submitted in support of a motion for summary judgment, (Hall Br. at 32)—actually lacks the specific language required by Rule 2-501(c) regarding the affiant's competence to testify. If the Speigner Affidavit had used this alternative form of oath, which is what Mr. Hall is effectively advocating, the affidavit would still be clearly insufficient, without more, to satisfy the requirements of Rule 2-501(c). The only logical interpretation of Rules 1-304 and 2-501(c), taken together, is that either form of oath set out in Rule 1-304 is sufficient to support a motion for summary judgment *if accompanied by* a statement as

to the personal knowledge *and* competence of the affiant as required by Rule 2-501(c). The Speigner Affidavit indisputably contains such a statement.

As best we can determine, this Court has never held that the statement required by Rule 2-501(c) can only be set out in the concluding form of oath, rather than elsewhere in the affidavit. Rather, the cases addressing this issue appear to require only that the affidavit itself contain the requisite language. In *White v. Friel*, 210 Md. 274, 279-80, (1956), the Court stated, as to the sufficiency of affidavits supporting a motion for summary judgment:

> The affidavits supporting these answers recited that the affiant 'made oath in due form of law that the aforegoing facts are *true to the best of his* [or her] *knowledge and belief.*' (Italics ours.) Neither of these affidavits recited that it was made on personal knowledge, and neither stated affirmatively that the affiant was competent to testify to the matters stated therein. We may assume that the defendants necessarily had personal knowledge of whether they had or had not ordered the materials and were competent to testify with regard thereto, but two deficiencies remain in their affidavits. One is that they contained no affirmative showing, as required . . . that the affiants were competent to testify with regard to the deliveries to the Corporation or with regard to the plaintiff having billed the goods to it.

210 Md. at 279-80. The Prince George's County Circuit Court in this case, unlike the Court in *White*, was not left to "assume" that Mr. Speigner had personal knowledge and was competent to testify to such matters because the very first sentence of the Affidavit expressly affirms Mr. Speigner's personal knowledge and Mr. Speigner's capacity to make the Affidavit.

That was not the situation in the other cases in which affidavits have been excluded because they were based only on "knowledge, information and belief." *See, e.g., Reeves v. Howar*, 244 Md. 83, 89 (1966) (affidavit was defective on its face because

it recited that the affiant was "confident to testify," rather than that he was *competent* to testify;" affiant also lacked personal knowledge of the events set forth in the affidavit); *Fletcher v. Flournoy*, 198 Md. 53, 60 (1951), *cert. denied* 343 U.S. 917 (1952) (affidavit insufficient because "[t]hese allegations set forth no 'such facts as would be admissible in evidence', and do not show 'that the affiant is competent to testify to the matters stated therein'. They state only legal or argumentative conclusions.").

In *Mercier v. O'Neill Associates, Inc.*, 249 Md. 286 (1968), the Court considered several affidavits. The first affidavit contained a statement that the affiant, Mr. Mercier, "read the foregoing and annexed Plea to the Declaration; that he has personal knowledge of those matters set forth therein; that the same are true; and that he is competent to testify thereto." The Court took no issue with this particular language,[1] which is strikingly similar to the language used by Mr. Speigner. With regard to another affidavit in that case, the Court observed that:

> The affidavit of M. Reese Mitchell . . . , after reciting his competence to testify to the indebtedness of Mercier in the amount of $1,170 plus interest from December 15, 1965, continued '* * * and the said affidavit did further in like manner make oath that he personally arranged interviews for the Defendant with prospective employers, and that he has personal knowledge of the matters and things here-hereinbefore set forth and that he said are true and correct to the best of his knowland [sic] belief; * * *.' (Emphasis supplied.) Such an affidavit is defective in form and substance.

Id. at 287 (citing *Reeves*, 244 Md. at 89). The obvious typographical error in using the word "knowland" instead of "knowledge" provided the basis for the Court's rejection of

[1] With regard to Mr. Mercier's affidavit, the Court of Appeals appeared only to question the contents of the statements made in the affidavit, noting that "Schmidt's affidavit is the only competent evidence for a basis upon which the court could establish damages." *Mercier*, 249 Md. at 289.

that affidavit. The Court's citation to *Reeves* bears this out, as the Court in that case found the affidavit lacking because of the use of the word "confident" instead of "competent." *See Reeves*, 244 Md. at 89. As the Court in *Reeves* noted, "[t]here is much difference between confidence and competence." *Id.* Thus, the Court of Appeals has focused on the necessity of using precise language regarding personal knowledge and competence to testify, and it is clear from the face of Mr. Speigner's affidavit that such requirements have been satisfied.

In any event, Mr. Hall's response to the County Central Committee's Motion for Summary Judgment failed to identify with particularity *any* material fact in Mr. Speigner's Affidavit as to which Mr. Hall contended there was a genuine dispute. Thus, to the extent Mr. Hall believed that the Circuit Court should not have relied on any particular fact asserted in the Affidavit, Mr. Hall himself failed to comply with Md. Rule 2-501(b), requiring that such grounds be set forth. Accordingly, it was not error for the Circuit Court to consider the Affidavit, if indeed the Circuit Court did so. Mr. Hall has not identified any specific factual assertion from the Speigner Affidavit on which the Circuit Court relied in its opinion. Thus, in any event, Mr. Hall was in no way prejudiced by the consideration of Mr. Speigner's Affidavit.

As to the second requirement of Md. Rule 2-501(b), requiring that the facts stated within constitute admissible evidence, Mr. Hall claims that Mr. Speigner's affidavit referenced newspaper articles containing inadmissible hearsay. (Hall Br. at 33). That contention is meritless. Clearly the newspaper articles were not relied upon for the truth of their contents, but rather for the facts that (i) the articles made serious allegations about

Mr. Hall; (ii) the articles were published only *after* the Committee's submission of the Mr. Hall's name to the Governor on November 7; and, (iii) none of the information in the articles had been disclosed by Mr. Hall to the Committee. *See* Speigner Affidavit ¶¶ 5, 6, 10, 11 (E 262-64). This Court recognizes the "general rule that 'a relevant extrajudicial statement is admissible as nonhearsay when it is offered for the purpose of showing that a person relied on and acted upon the statement and is not introduced for the purpose of showing that the facts asserted in the statement are true.'" *Parker v. State*, 408 Md. 428, 438 (2009) (citing *Graves v. State*, 334 Md. 30, 38 (1994)). Further, the introduction of this so-called "hearsay evidence" "must be weighed against its undue prejudice to the defendant in determining its admissibility." *Graves*, 334 Md. at 39. As Mr. Hall, however, has claimed no prejudice based on the inclusion in the record of these references to media accounts in Mr. Speigner's Affidavit. The Circuit Court correctly denied Mr. Hall's motion to strike the Speigner Affidavit.

CONCLUSION

For the reasons set forth above, the order of the Circuit Court for Prince George's County granting summary judgment to the appellees and denying summary judgment to the appellants, and the Declaration of Rights entered by the Circuit Court, should be affirmed.

Respectfully submitted,

Joseph E. Sandler
Elizabeth F. Getman
Sandler, Reiff, Young & Lamb, P.C.
1025 Vermont Ave., N.W. Suite 300
Washington, D.C. 20005
Tel: (202) 479-1111
Fax: (202) 479-1115
sandler@sandlerreiff.com
getman@sandlerreiff.com

Attorneys for Appellee Prince George's County Democratic Central Committee

December 27, 2012

Md. Rule 8-504(a)(8) Statement: This brief has been prepared with proportionally-spaced type—Times New Roman, 13 point.

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2012, I caused the foregoing Brief of Appellee Prince George's County Democratic Central Committee to be served by e-mail and first class mail upon:

Walter W. Green, Esq.
Law Office of Walter W. Green
7309 Baltimore Avenue, Suite 115
College Park, MD 20740
WGreen@greenslaw.com

Raouf M. Abdullah
Raouf M. Abdullah & Associates LLC
14714 Main Street
Upper Marlboro, MD 20772
rma.abdullahlaw@gmail.com

Irwin R. Kramer
Kramer & Connolly
465 Main Street
Reisterstown, MD 21136
IRK@kramerslaw.com

Matthew J. Fader
Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, MD 21202
mfader@oag.state.md.us

Elizabeth F. Getman

APPENDIX TO BRIEF OF
APPELLEE PRINCE GEORGE'S COUNTY
DEMOCRATIC CENTRAL COMMITTEE

CITATION AND VERBATIM TEXT OF PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES ORDINANCES AND REGULATIONS (NOT INCLUDED IN APPELLANT'S APPENDIX)

Md. Code Ann., St. Pers. & Pens. § 9-204

§ 9-204 Holiday leave

Use of holiday leave on day of holiday

(a) Except as otherwise provided in this subtitle, an employee shall use holiday leave on the day the employee holiday occurs.

Holidays occurring on Saturday or Sunday

(b) Except as otherwise provided in this subtitle:

(1) If the employee holiday occurs on a Saturday, an employee shall use holiday leave on the Friday immediately before the employee holiday; and

(2) If the employee holiday occurs on a Sunday, an employee shall use holiday leave on the Monday immediately following the employee holiday.