

Exhibit 4

JOHN F. MCMAHON,	*	
PLAINTIFF,		IN THE
	*	CIRCUIT COURT
V.		FOR
	*	ANNE ARUNDEL COUNTY
WAYNE ROBEY, as Clerk of Court,		
DEFENDANT.	*	CASE # C-02-CV-16-001949
		...ooo0ooo...

AFFIDAVIT OF PLAINTIFF JOHN MCMAHON

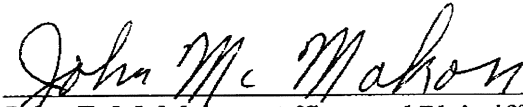
I, JOHN F. MCMAHON, hereby certify on this 12th day of July, 2016, as follows:

1. I am a competent private person over 18 years of age and the Plaintiff in the above captioned matter.
2. The contents of my March 28, 2016 letter to Governor Hogan, attached to my Complaint as Exhibit 2, are true and correct based upon my personal experience.
3. On March 28, 2016 I also wrote a letter of inquiry to Clerk Wayne Robey which is attached herto, marked as Exhibit 5, and incorporated herein. My reference in ¶5 of my *Complaint* was meant to be to this letter (Exhibit 5).
4. Since receiving the March 23, 2016 anonymous letter, Exhibit 1 to my Complaint, I have constantly and repeated attempted to inquire as to why Mr. Fitzgerald has been secretly allowed to be the *de facto* Sheriff of Howard County. I have found no one in any official governmental position that can satisfactorily explain the fact that Mr. Fitzgerald continues to exercise the powers and duties of being the Howard County Sheriff without taking the oath of office. SOME of the county and state officials with whom I have sought explanation are:
 - a. I met with Wayne Robey, Clerk of Circuit Court and received confirmation that Mr. Fitzgerald had failed to take the oath of office after the 2014 General Election;

- b. I met with Craig Glendenning the Howard County Auditor;
- c. I phoned the Maryland Secretary of State's office and the lady who answered the phone said they weren't responsible for elected offices;
- d. I met with Howard County Board of Elections chief Guy Mickley who said it was not the local board's responsibility and he gave me the phone number for the State Board of Elections;
- e. I phoned the State Board of Elections several times until they referred me to Brian Frosh, the Attorney General;
- f. I phoned the Attorney General's office and the lady who answered the phone referred me to Howard County State's Attorney Dario Brocollino;
- g. I talked with Mr. Brocollino twice and he suggested I talk with the independent prosecutor;
- h. I drove to Towson to talk with the investigators at the independent prosecutor's office;
- i. I have talked with Governor Hogan's office repeatedly (20 or more times) with no discernable results;
- j. I have met with Howard County Exec Alan Kittleman;
- k. I have phoned the personal secretaries for Calvin Ball, Mary Kay Sigaty, and Greg Fox, members of the Howard County Council, and, with the notable exception of Mr. Calvin Ball, none of these County Council members returned my phone calls;

- l. I went to the Board of Elections for Howard County three times looking at some of Mr. Fitzgerald's records and the local board referred me to the State Ethics Commission for some missing records;
 - m. I drove to Annapolis to the State Ethics Commission and talked with Mike Lord who referred me to one of their attorneys who produced the missing records for 2013 & 2015.
5. Prior to the March 23, 2016 anonymous letter, none of the above state and local officials made any effort to inform me OR THE PUBLIC of the fact that Mr. Fitzgerald had failed to take the constitutionally mandated oath of office.
 6. I remain faithful to those who voted for me in the 2014 General Election and I remain ready to take the oath of office as required by the MARYLAND CONSTITUTION and to serve all the people of Howard County as their Sheriff.

I DO SOLEMNLY DECLARE AND AFFIRM UNDER PENALTIES OF PERJURY THE MATTERS AND FACTS SET FORTH HEREIN ARE TRUE AND CORRECT BASED UPON MY PERSONAL KNOWLEDGE.



John F. McMahon, Affiant and Plaintiff

John F. McMahon v. WAYNE ROBEY, *et al.*

Joint Record Extract

5.

PLAINTIFF AFFIDAVIT

(10/17/16) (R 230–233)

E047–E050

Exhibit 7

JOHN F. MCMAHON,
PLAINTIFF,

*

IN THE
CIRCUIT COURT

*

FOR

V.

*

ANNE ARUNDEL COUNTY

WAYNE ROBEY, *et alia*,
DEFENDANTS.

*

Case # C-02-CV-16-001949

...00000000...

AFFIDAVIT OF PLAINTIFF JOHN F. MCMAHON

JOHN F. MCMAHON, having made due affirmation according to law, deposes and says:

1. I am the Plaintiff in the above captioned matter and I am competent to testify to the matters herein stated.
2. I have reviewed the *Amended Complaint* and the *Motion for Temporary Restraining Order* filed by my counsel, Allen R. Dyer, in this action. The facts alleged in the said *Amended Complaint* and *Motion for Temporary Restraining Order* are true and correct to the best of my knowledge information and belief.
3. I have been in contact with the administrative staff of the Maryland Governor's Office and discussed the matter of an upcoming appointment to the office of Sheriff of Howard County. I have been told that an appointment will be made soon since the last day on the job of outgoing Sheriff James Fitzgerald was Saturday, October 15, 2016.
4. I was a candidate for the 2014-2018 term of office for Sheriff of Howard County on the 2014 general election ballot and I received 42,692 votes.
5. As a result of a recent anonymous tip, I paid a fee to Howard County Clerk Wayne A. Robey for a report on the most recent date for the swearing in for the Howard County

Sheriff and that report (which is attached and appended to the Amended Complaint in this matter) stated: "You have inquired about the Oath of Office for the Howard County Sheriff. Please be advised that the last Oath of Office administered to the Howard County Sheriff was dated December 14, 2010."

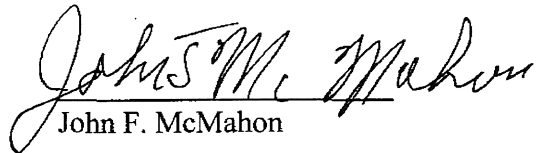
6. The core allegation in my *Amended Complaint* in this matter is outgoing Sheriff Fitzgerald never took the oath of office for the 2014-2018 term.
7. The Defendants in this matter are: Wayne A. Robey, is the elected Clerk of the Howard County Circuit Court; James F. Fitzgerald, a 2014 candidate for Howard County Sheriff; Linda H. Lamone, State Administrator of the Maryland Board of Elections; John C. Wobensmith, Maryland Secretary of State; and, Larry Hogan, the Governor of the State of Maryland.
8. None of the Defendants in this matter have contested my allegation that Defendant Fitzgerald failed to take the oath of office for the 2014-2018 term of office for Howard County Sheriff.
9. I have closely followed the recent press reports that led to the resignation of outgoing Sheriff Fitzgerald and I am concerned that the press reports have not reported any discussions by publicly elected officials about: FROM WHICH TERM is Sheriff Fitzgerald is resigning?
10. I believe the Governor plans to appoint a Howard County Sheriff without specifying which term of office for which he is making the appointment and such an action would cause legal confusion and run into problems with the Maryland Constitution.

11. I am concerned that the administrative staff in the Governor's office have told me over the telephone that Governor can appoint someone to the Howard County Sheriff's office for the current term of 2014-2018 and they are taking applications.
12. I have read recent statements on the internet purportedly made by the Governor after the announced resignation of James Fitzgerald. Those statements by the Governor indicate he thinks he has the power to appoint a new Sheriff for the current term of office (2014-2018). Furthermore, the Governor's statement avoided any mention of the issues of oath of office, residency and improper use of county funds in the election campaign of 2014.
13. I am concerned that a poorly prepared statement of appointment to the office of Sheriff for Howard County could moot or otherwise confuse the subject of my Election Law case before the Court.
14. I am also concerned that an ill advised, poorly limited appointment decision would create a constitutional problem because of the violation of the separation of power provision of the MARYLAND CONSTITUTION.
15. As a candidate for office for the 2014-2018 term of office for Sheriff of Howard County, I believe my Maryland Election Law case seeking a declaratory judgment about the 2014-2018 term of office for Sheriff of Howard County should be resolved by the Courts and not by an independent, unilateral executive appointment.
16. As a candidate for office in the 2014 general election I believe I have standing in this matter and it is my objective that this substantial breakdown in our system of

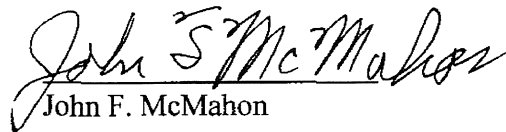
representative democracy be addressed by the Courts for the benefit all Maryland voters. I believe this is the constitutional role of the judiciary.

17. I remain a candidate for the office of Howard County Sheriff for the term of 2014-2018 and I am ready and willing, and would be honored, to take the oath of office and do everything to the limit of my abilities to restore the confidence of the public in the Howard County Sheriff's department.

Date: October 17, 2016


John F. McMahon

I SOLEMNLY AFFIRM under the penalties of perjury that the contents of the foregoing paper are true to the best of my knowledge, information and belief.


John F. McMahon

John F. McMahon v. WAYNE ROBNEY, *et al.*

Joint Record Extract

6.

HEARING SHEET

(10/31/16) (R 293)

E051



**Civil Hearing Sheet
IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY**

JOHN MCMAHON
Plaintiff
(A. DYER)

Case No. C-02-CV-16-1949

Date: October 31, 2016

VS


WAYNE ROBESY, ET AL.
Defendant
(S. CORDISH/ J. LEVINE)

Clerk: S. WEBER
4C

Case called for Hearing on MOTION TO DISMISS

In Open Court before Judge WILLIAM C. MULFORD, II

Counsel heard. Court placed opinion on the record. Court GRANTED Defendant's Motion to Dismiss. Court signed Order in file.



Judge

John F. McMahon v. WAYNE ROBey, *et al.*

Joint Record Extract

7.

HEARING TRANSCRIPT

(10/31/16) (R 304–324)

E052–E072

Oral Opinion Judge William C. Mulford, II

(T12–T19)

E063–E070

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

JOHN F. MCMAHON,

Plaintiff

v.

Civil Docket

Case No.: C-02-CV-16-001949

WAYNE ROBESY, ET AL.,

Defendants

OFFICIAL TRANSCRIPT OF PROCEEDINGS
HEARING ON MOTION TO DISMISS

Annapolis, Maryland

Monday, October 31, 2016

BEFORE:

HONORABLE WILLIAM C. MULFORD II, JUDGE

APPEARANCES:

For the Plaintiff:

ALLEN R. DYER, ESQ.

For the Defendant:

JASON L. LEVINE, ESQ.

Transcribed from electronic recording by:

Bonnie L. Golian
Legal Transcriptionist
CV Court Reporting
410-382-0437

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P R O C E E D I N G S

(1:36 p.m.)

THE COURT: The Court calls C-02-CV-16-001949, John McMahon versus Wayne Robey, et al. Counsel, please state your names and spell your last names for the record. Mr. Dyer.

MR. DYER: Yes, Your Honor. Allen Ray Dyer, D-Y-E-R, I am counsel for John McMahon.

THE COURT: Thank you so much.

MR. LEVINE: Good afternoon, Your Honor. Jason Levine, Assistant Attorney General, L-E-V-I-N-E, on behalf of the defendants.

THE COURT: All right. We are here on the defendants' motion to dismiss. I am happy to hear from you, Counsel.

MR. LEVINE: Thank you, Your Honor. Just to sum up very briefly, I know we addressed some of these same facts recently at the TRO hearing.

This case arises out of the 2014 election for Howard County Sheriff. The result of that election was Mr. Fitzgerald, the two-term incumbent, receiving 55,659 votes and the Plaintiff, Mr. McMahon, his challenger, receiving 42,692 votes. A commission was issued for Sheriff Fitzgerald and the complaint alleges -- and we can assume it to be true for the purposes of this hearing -- that for whatever reason Sheriff Fitzgerald did not take the required oath of office. And in

1 such a circumstance the Maryland Constitution is relatively
2 clear about what the ultimate result is. And it's very simply,
3 the governor makes an appointment. And if we look at Article
4 4, Section 44 of the Maryland Constitution which governs and
5 creates the Office of the Sheriff it says very clearly that in
6 case of vacancy by death, resignation, refusal to serve, or
7 neglect to qualify or give bond or by disqualification or
8 removal from the County or City, the Governor shall appoint a
9 person to be Sheriff for the remainder of the official term.

10 Now, the crux of Mr. McMahon's argument is what
11 happens in that instance is the votes for Sheriff Fitzgerald
12 are nullified and that the remaining challenger, Mr. McMahon,
13 is then entitled to the office. And he relies on what we
14 discussed before, is this English Rule. And there's just very
15 simply no support either in Maryland or anywhere around the
16 country for the English Rule. Courts around the country that
17 have considered it have roundly rejected it, and for good
18 policy reason. I'll note one case in particular -- I know we
19 didn't have the opportunity to file a reply, but one of the
20 cases from Montana that Mr. Dyer relies upon was rejected by
21 the Supreme Court of Oklahoma in 1990 in *Evans v. State*
22 *Election Board of the State of Oklahoma*, that's at 804 P.2d
23 1125. And the court in Oklahoma says, as many of the other
24 courts around the country have said, that we believe the better
25 rule is the majority view called the American Rule. And the

1 Court notes that there has been sound criticism that the
2 English Rule has received in this country based upon its lack
3 of reason, justice, and logic and also due to the practical
4 difficulties involved in the rule's application.

5 And I think that's consistent with language from our
6 Court of Appeals, specifically in *Cabrera* which we cite in our
7 papers, where the court looks at the language of 12-202 of the
8 Election Law Article and talks about how difficult it is to
9 prove -- and even plead -- that there is a substantial
10 probability that the outcome of the election would have been
11 different. And the Court of Appeals notes that 12-202(a)(2)
12 purposefully has, quote, "real bite" and that it is a
13 reflection of the entrenched common law policy against
14 overturning elections in Maryland -- a presumption from which
15 this court has never wavered and of which the legislature has
16 never given any indication of disapproval.

17 So though the idea of the English Rule is sort of
18 interesting to debate and think about, the reality is that
19 neither the Court of Appeals in this state or any other
20 appellate courts -- recently, at least -- around the country
21 have embraced it for a number of reasons.

22 Moving past that, the complaint itself relies on a
23 very specific statute, 12-202 of the Election Law Article. And
24 as we point out in our papers that statute is inapplicable on
25 its face. Principally because he's not -- Mr. McMahon is not

1 challenging the qualifications of a candidate seeking election.
2 And I think that sort of ties into the English Rule argument
3 that they're making. Because even the English Rule cases when
4 they have sort of even entertained this idea, they talk about
5 candidates who are, for example, deceased. And they've had
6 some cases where there was a candidate in a judicial election
7 who was deceased and, yet, that candidate remained on the
8 ballot and in many instances received the majority of the
9 votes. And even in those instances courts were not willing to
10 adopt this English Rule.

11 We don't have that here. We don't have a candidate
12 in Sheriff Fitzgerald -- who, of course, has now resigned for
13 reasons unrelated to this case -- but we don't have a candidate
14 who at the time that he was on the ballot and was the two-term
15 incumbent was disqualified from running for some reason. We
16 have an act that allegedly did not occur after the election --
17 after the results of the election had been certified -- where
18 he's alleged to have failed to take the oath of office.

19 So looking at the plain language of 12-202 of the
20 Election Law Article, that statute affords Mr. McMahon no
21 relief simply because he's not seeking to challenge a
22 qualification of Sheriff Fitzgerald.

23 The other arguments we make in our papers relate
24 simply to limitations and laches. And I think under either of
25 those the defendants are entitled to dismissal as well.

1 The first one is, the Election Law Article has a very
2 strict time deadline in terms of when you can raise these
3 challenges. And it's the earlier of ten days after the act or
4 omission -- or the date the act was known to the petitioner --
5 or seven days after the election results are certified. And,
6 again, this ties into what the Court of Appeals has made clear
7 is a very strong public policy. And the strong public policy
8 is in favor of ratifying the results of this election, filling
9 the vacancy, and moving forward.

10 Now, according to the complaint Mr. McMahon was able
11 to ascertain the same day he inquired as to whether or not
12 Sheriff Fitzgerald had taken the oath of office. He says in
13 his complaint that he went to the clerk's office, he presented
14 a letter requesting an answer to the question when is the last
15 time Sheriff Fitzgerald took the oath. And according to his
16 papers, received a written response the same day that the last
17 oath that was taken was in 2010. Certainly that could have
18 been done at any time even assuming that he was challenging
19 something that even falls within 12-202. So if we look at the
20 timeliness requirements in 12-202 the action would be time-
21 barred.

22 And, finally, we get to laches. And I think the case
23 law has been very clear. I know Mr. Dyer presented me in the
24 hall with some other cases involving laches. They are not
25 election law cases per se, I think one deals with a coram nobis

1 petition. But there's no question that the Court of Appeals
2 has pretty consistently applied the doctrine of laches to
3 delays much, much shorter than the year-and-a-half that went by
4 here. We have an election that was completed and the results
5 were certified in November of 2014 and we have a lawsuit that
6 was filed in March of 2016, almost halfway into Sheriff
7 Fitzgerald's term, challenging his right to the office and
8 asserting that Mr. Dyer (sic) was instead entitled to the
9 office.

10 So for all of these reasons I think any one of which
11 would be dispositive, the defendants move for a dismissal.

12 THE COURT: Okay. Welcome back.

13 MR. DYER: Thank you, Your Honor.

14 THE COURT: It's good to see you again.

15 MR. DYER: The problem with the Attorney General's
16 argument is that the issue here is purely constitutional issues
17 and it's not just one provision in the Constitution. The cited
18 provision by Counsel was Section 44, Sheriffs. And within that
19 provision there is a phrase that says he, the Sheriff, shall
20 hold office for four years until his successor is duly elected
21 and qualified. And the duly elected and qualified is a term of
22 art. And qualified in the sense of election law at the
23 constitutional level is related to another section of the
24 Constitution which is Article 1, Section 10, how officers may
25 qualify and construction of words and phrases. And in Section

1 10 of Article 1 it states, any officer elected or appointed in
2 pursuance of the provisions of this Constitution may qualify
3 either according to the existing provisions of law in relation
4 to officers under the present Constitution, or before the
5 governor of the state, or before any clerk of any court of
6 record in any part of the state. But in case an officer shall
7 qualify out of the county in which he resides an official copy
8 of his oath shall be filed and recorded in the clerk's office
9 of the circuit court of the county in which he may reside or in
10 Baltimore City, if that should be the case.

11 And that is what qualify in terms of use in the
12 Maryland Constitution refers to. It is taking the oath of
13 office before an appropriate authority, usually the clerk of
14 the court. But as it states here in Section 10 -- Article 1,
15 Section 10 -- even if there is an effort to qualify before
16 another clerk in another court or someplace else in the state,
17 a copy of that oath of office has to be given to the clerk
18 where the office is being pursued, which is hopefully where the
19 sheriff candidate also resides.

20 So as mentioned, I think we have to assume for the
21 motion to dismiss today that Mr. McMahon's allegation that Mr.
22 Fitzgerald, the incumbent sheriff, did not take the oath of
23 office for the 2014 to 2018 term is true. And so that means
24 the sheriff did not qualify for this term in office.

25 But, referencing back to Section 44 of Article 4, the

1 phrase until his successor is duly elected and qualified. It
2 says nothing about appointed there. It says duly elected and
3 qualified which means elected and sworn in. That did not
4 happen for the term of office for 2014 to 2018. Which means
5 that the incumbent sheriff from the 2010 to 2014 term was a
6 holdover remaining in office. As he remained in office there
7 was nothing stated by the Governor, by the Clerk of the Court
8 of Howard County or any other county clerk, or the head of the
9 elections committee, or the Secretary of State for Maryland,
10 that this gentleman -- Mr. Fitzgerald -- was not holding as a
11 de jure officer but rather he was a de facto officer.

12 This was not covered in any newspaper that my client
13 is aware of and I don't think that there is any newspaper that
14 did cover this. And there has been no evidence -- in fact, the
15 Attorney General is not in a position to state whether or not
16 that oath was even taken today. Because this is a preliminary
17 matter and there has been no answer by the Attorney General.
18 And it is our position that this motion to dismiss is premature
19 because we do not know enough to determine how best to handle
20 the election in this matter.

21 We also do not have enough information in order to
22 determine whether or not laches applies. Because according to
23 our pleadings, we were unaware of what the Sheriff for Howard
24 County, the incumbent Sheriff for Howard County, was doing
25 until Mr. McMahon found out by inquiry that the Sheriff

1 actually had not taken the oath of office. At which point he
2 promptly retained counsel and filed suit.

3 So in a situation like that you have to look at the
4 fraud element. And one of the elements which has not been
5 referenced yet as far as the fraud is the impact of fraud on
6 the statute of limitations. We know that the impact of fraud
7 on laches halts -- if there is fraud then the time delay for
8 laches as to whether or not it's an unreasonable delay does not
9 start until the fraud is discovered. Which we argue and we
10 state in our complaint -- and also in an affidavit by the
11 petitioner, Mr. McMahon -- that he was not aware of this fraud
12 until he received the information from the Clerk of the Court.
13 And we are calling this a fraud.

14 Now, it may be that it's not a fraud. But that is
15 something that has to wait for the facts to come in. And as
16 this Court referenced in an earlier proceeding when the case
17 was initially dismissed with leave to amend, this Court said,
18 we need that interested person in here. We need Sheriff
19 Fitzpatrick (sic) in here so we can find out what's going on.
20 And that is what, based upon the clear instructions of this
21 Court, what Plaintiff did is we did amend, bring in the
22 sheriff, and we also brought in the other officials that were
23 associated with the integrity of the election.

24 There is a serious question about the integrity of
25 the election. And if the Court is going to make a rational

1 determination as to how this election contest would be settled
2 we feel, based upon the research that we've been doing from the
3 beginning and the accumulation of the research resources, we
4 believe that the Court of Appeals of Maryland adopts a halfway
5 position between the American Rule and the English Rule. And
6 it basically says we will decide the right thing based upon an
7 analytical approach. And in order to do that right thing, in
8 order to conduct that analytical approach, the Court has to
9 have the facts before it.

10 And that means that at this point, at this juncture
11 in this lawsuit in this election contest, it is premature to
12 dismiss this case. It may well be that laches is applicable
13 but we don't know yet. It may well be that it would be
14 inappropriate for Mr. McMahon with his 42,000 votes to be
15 declared the victor. But we don't know yet because we don't
16 know all of the surrounding circumstances.

17 We are operating in an environment where there has
18 been a fraud. That fraud was not uncovered by the Clerk of the
19 Court in Howard County. The fraud was not uncovered by the
20 Secretary of State of Maryland. The fraud was not uncovered by
21 the Chairman of the State Board of Elections. And the fraud
22 was not uncovered by the Governor. Those are the people that
23 are primarily responsible for the integrity of the electoral
24 process.

25 My client, at the first notice that he received that

1 the Sheriff was holding over instead of having taken the oath
2 of office, immediately contacted counsel and filed suit. So
3 that is our position, that is my -- there is an affidavit in
4 the file to that effect, and we feel that at this point the
5 motion to dismiss is premature and we would ask the Court for
6 an expedited discovery period so that we can get into that
7 discovery in a fast turnaround and come back to this Court in
8 the most prompt way in order to resolve this problem. Thank
9 you.

10 THE COURT: I'm going to get in trouble for what I'm
11 about to say probably at some point. I was fully prepared to
12 declare the office vacant for the failure to swear the oath.
13 And I didn't have full briefing on it so I was waiting to see
14 what would happen. But based upon my preliminary reading of
15 the Constitution and the law I was even prepared to declare it
16 vacant if he at the last minute -- as Mr. Cordish was asking me
17 what he should do and I wouldn't tell him at the first hearing
18 that we had -- swore the oath during the litigation. Because
19 the commission that I believe was originally offered said he
20 had 30 days to swear him.

21 The problem was -- and I remember asking this, Mr.
22 Dyer -- you didn't want me to declare the office vacant.

23 MR. DYER: Correct, Your Honor.

24 THE COURT: Because it goes back to the trite sayings
25 that are usually the most accurate sayings -- you can't have

1 your cake and eat it, too. If I declared it vacant the
2 gentleman doesn't stand next in line. It goes to the Governor.
3 So you took what I find to be one of the most creative
4 approaches to this, but I don't think you're going to have your
5 cake and eat it, too.

6 And I would have been fascinated to see how the
7 Attorney General responded and how this case would have gone
8 upstairs and what the Court of Appeals would have done,
9 especially in light of what I will simply refer to as the
10 subsequent revelations which you provided me with multiple
11 copies of. I mean, truly fascinating reading.

12 But having said that, what I am here for is a
13 preliminary motion under Rule 2-322 where the Attorney General
14 has asked me to consider on a permissive 2-322 subsection (b).
15 motion to dismiss for basically lack of jurisdiction and
16 failure to state a claim about which relief can be granted.

17 The pleadings were properly framed and the Court
18 assumes all well-pled pleadings. And the Court cannot grant
19 relief if there is a well-pled pleading which seeks relief and
20 relief can be granted. To put it another way, if the complaint
21 even if well-pled fails to state a claim upon which relief can
22 be granted, then the Court must consider the motion to dismiss
23 and grant it.

24 So I look at this case and I have reviewed it --
25 especially since I dismissed it without prejudice over the

1 Attorney General's objection and granted leave to amend --
2 because I felt back in August that you hadn't joined the
3 necessary parties. And I felt that the Sheriff and the
4 Governor had a stake in this issue. And I felt I made that
5 clear and you promptly filed an amended complaint and joined
6 the necessary parties.

7 But I am still where I was before. And when you
8 joined the Sheriff, the Governor, the Administrator of
9 Elections, and I think you also joined the Secretary of State,
10 I fall back where I was before. And the complaint to boil it
11 down to its most simple matters says that Mr. Fitzgerald failed
12 to take the oath timely and, therefore, he is unqualified and
13 the runner-up should be, by way of a mandamus action or a
14 declaratory judgment, deemed to be the sheriff. And the
15 request is basically for the Court to order the clerk to
16 administer the oath, to nullify the votes, and Governor Hogan
17 to issue the commission. That's what it comes down to.

18 I draw all reasonable inferences that can be drawn in
19 the light most favorable to your client. But I find myself at
20 the point where I have to grant the motion to dismiss because I
21 do believe the complaint fails to state a claim upon which I
22 can grant relief.

23 There are a number of different reasons. When I look
24 at the election law challenge, there is no challenge to the
25 qualifications of the candidate and the process of the election

1 itself. For example, he is not a United States citizen. The
2 election is over 16 months ago. You have seven days to file a
3 claim after the results are certified, and it was -- the *Baker*
4 *v. O'Malley* case which was cited was actually a case that I
5 heard and that was one of the leading election law cases, 217
6 Md. App. I think it was 285 or 288. And that's where the
7 Orphan's Court judge won the election but at the same time, the
8 voters changed the qualifications for the office. And the
9 complaint, which was filed two years later, asked me for
10 mandamus. I held it was not barred by the statute of
11 limitations. Maybe I -- I clearly held that mandamus didn't
12 apply because of laches.

13 So here we don't have within the statute of
14 limitations that seven days to file the claim. We have the
15 laches issue. And it just seems to the Court that laches would
16 apply.

17 I cannot agree with the argument that Mr. McMahon has
18 a valid claim to this office. I know he has asked for that and
19 you have pled that. But as I read the Maryland Constitution,
20 Article 1, Section 11 talks about the refusal to take the oath.
21 And -- it's either refusal or neglect to take the oath. And as
22 I read it, that creates a vacancy. And Article 11, Section 11,
23 the Governor has the power to fill vacancies. And Article 4,
24 Section 44, the Governor has the power to fill the vacancies
25 which arise in the Office of the Sheriff.

1 I read the Constitution very differently than you do,
2 Mr. Dyer. I don't see Mr. McMahon having any valid claim at
3 all. I'm sorry, sir, but I don't for the reasons that I have
4 indicated. It's the Governor's appointment. You are not
5 entitled to it in the Court's opinion. The Court of Appeals
6 will tell me if I'm right or wrong.

7 Vacancy has its ordinary meaning. There is just no
8 present officer, or, there's a person who is there who wasn't
9 qualified and he didn't swear the oath. And I was fully
10 prepared to declare it vacant. But I have seen no case law to
11 support the argument that a candidate who finishes second
12 becomes the winner when the office holder fails to take the
13 oath -- the person who finishes first. I just don't find any
14 case law.

15 So I believe that there is a lack of a claim upon
16 which relief can be granted. Laches would also bar the claim.
17 The Court finds there was an unnecessary delay in the assertion
18 of the right.

19 This case should serve as a caveat for those who are
20 candidates and election lawyers. If you are not successful you
21 should immediately ask the clerk, have they sworn the oath.
22 And if not that may be the proper way for a declaratory
23 judgment.

24 But if the office is vacant, the Governor appoints.
25 I will not interfere in the constitutional process. I will

1 grant the motion to dismiss for failure to state a claim upon
2 which relief can be granted. The Court does not believe that
3 there is authority for the relief that is requested.

4 I don't know what Governor Hogan will do. I find him
5 to be a man of principle and common sense. I met him a couple
6 of times in casual, he wouldn't know my name or face unless I
7 told him who it was and then he'd probably need a staff member
8 to tell him what I do. And whether it was Governor Hogan or
9 one of the previous governors, I find myself in the position of
10 a Court of having to uphold and follow the Constitution. It
11 seems to me Article 4, Section 44 is very clear about who has
12 the authority to appoint. And I cannot see where Mr. McMahon
13 has the right or claim to this job.

14 I am going to grant the motion to dismiss. I don't
15 believe I will have the last word in this matter. I anticipate
16 that there will be further action. And I anticipate that the
17 Governor will be appointing someone at some point. It will be
18 a most interesting constitutional issue should the Court of
19 Appeals choose to take it.

20 I wish Mr. McMahon, as with any other challenger, the
21 best of luck in seeking this seat. I am sure that he will
22 apply. I have read his background, he seems to be an
23 impeccable candidate. And based upon what I read and the
24 articles that you gave me, it would be hard to see how he could
25 in any way have run the office in a worse fashion. In fact, it

1 seems to be that with a little bit of common sense, courtesy,
2 decorum, and decency which he certainly seems to possess when
3 he has appeared in front of me -- I don't see how he could have
4 done worse -- there's absolutely no doubt in my mind that
5 practically anyone could have done better.

6 But having said that, I am ruling on the
7 constitutional issues. So, Mr. McMahon, I wish you luck in
8 your pursuit of the office. I find this to be a most
9 interesting case. But I just cannot see under either the
10 Constitution or the election laws that he is entitled to the
11 relief you are requesting.

12 Had you asked me to declare the office vacant, there
13 is a very good chance that would have happened. These words
14 will probably come back to haunt me because I am sure that
15 following some election in the future somebody's going to not
16 swear the oath and somebody's going to come trotting down and
17 they're going to say, we want Judge Mulford to hear this case.
18 But I judge them as I see them. I wish you luck, but I am
19 going to grant the motion to dismiss.

20 Now, there is a request for declaratory judgment.
21 The Attorney General in their motion to dismiss provided an
22 order, and the order did not address a declaratory judgment
23 that was requested. I would ask the Attorney General to send
24 me -- and you can give my law clerk, my law clerk will give you
25 her email -- a very simple declaratory judgment, the Court

1 declares, basically, in the negative. Because they get mad at
2 us when we grant motions to dismiss or grant relief without
3 actually declaring the judgment. So, do you understand what
4 I'm saying?

5 MR. LEVINE: I do, Your Honor. I will prepare that
6 today.

7 THE COURT: All right. And please run it by Counsel.
8 I would ask that you do that sooner rather than later. I
9 believe the clock is ticking.

10 MR. DYER: It's a five-day clock, Your Honor.

11 THE COURT: What's that?

12 MR. DYER: It's a five-day clock.

13 THE COURT: I believe it's ticking. So the sooner
14 you get that to me the better. But I have granted the motion
15 to dismiss and I'm not going to stay that ruling.

16 Now, knowing that the appointment process is out
17 there, and knowing that your client wishes to preserve this
18 claim, I just want to make sure that he has the right and the
19 ability to preserve it -- should he wish -- on appeal. So
20 that's why I would ask for it forthwith. All right? And I
21 think it would be clearer for all parties.

22 With the exception of that *Baker* case you cited,
23 pretty much every single one of these that I handled goes up
24 pretty quickly. I think Judge Silkworth and I are handling
25 just about all the election-type cases that come through here,

1 or at least have in the last couple of years. And we find they
2 get upstairs pretty quickly and we find that they issue their
3 rulings pretty quickly. Judge Harris just had one, they
4 overturned that one. I think he stayed something for Baltimore
5 City. So I, myself, have a couple of these upstairs right now.
6 So we'll see what happens.

7 But, Mr. McMahon, good luck to you. I'm sorry, but I
8 just don't see it the way you do. Your attorney does. But
9 that is not in any way an indictment of your character or your
10 challenge. And I actually commend you for persevering in this
11 case and I just wonder what the shockwaves that would have
12 rolled through the system would have been had I just declared
13 the office vacant.

14 All parties are excused. Thank you.

15 MR. DYER: Thank you, Your Honor.

16 MR. LEVINE: Thank you, Your Honor.

17 (At 2:10 p.m., proceedings conclude.)

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CERTIFICATE OF TRANSCRIBER

I hereby certify that John F. McMahon v. Wayne A. Robey, et al., Case No. C-02-CV-16-001949, heard in the Circuit Court for Anne Arundel County, Maryland, on October 31, 2016, was recorded by means of digital audio recording.

I further certify that, to the best of my knowledge and belief, page numbers 2 through 20 constitute a complete and accurate transcript of the proceedings as transcribed by me.

I further certify that I am neither a relative to nor an employee of any attorney or party herein and that I have no interest in the outcome of this case.

In witness whereof, I have affixed my signature this 4th day of November, 2016.

Bonnie L. Golian
Bonnie L. Golian
Legal Transcriptionist

John F. McMahon v. WAYNE ROBey, *et al.*

Joint Record Extract

8.

DECLARATORY JUDGMENT

(10/31/16) (R 294–295)

E073–E074

JOHN F. McMAHON,	*	IN THE
Plaintiff,	*	CIRCUIT COURT
v.	*	FOR
WAYNE ROBEY, et al.,	*	ANNE ARUNDEL COUNTY
Defendants.	*	
	*	Case No. C-02-CV-16-001949

* * * * *

DECLARATORY JUDGMENT

Upon consideration of the Plaintiff's Amended Complaint, the Defendants' Motion to Dismiss, the Plaintiff's Reply, and the Court's hearing on the matter, on this 1st day of November, 2016, the Circuit Court for Anne Arundel County finds and declares:

That former Sheriff James Fitzgerald's failure to take the oath of office does not nullify the votes cast for him in the 2014 election for the office of Sheriff of Howard County;

That Plaintiff did not, by virtue of any such failure, receive the majority of all legally valid votes in said election; and

That the Plaintiff has no right or claim to the office of Sheriff of Howard County, and that only the Governor may make an appointment to a vacancy in the office of Sheriff.



The Honorable William C. Mulford II
Circuit Court Judge for Anne Arundel County

11-09-16 mkg

Copies to:

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Ellicott City, Maryland 21042

Jason L. Levine
Assistant Attorney General
80 Calvert Street
Annapolis, Maryland 21401

Stuart J. Cordish
Assistant Attorney General
200 Saint Paul Place
20th Floor
Baltimore, Maryland 21202

John F. McMahon v. WAYNE ROBEY, *et al.*

Joint Record Extract

9.

**ORDER OF DISMISSAL FIRST AMENDED
COMPLAINT with Prejudice**

(11/03/16) (R 296)

E075

JOHN F. McMAHON,

Plaintiff,

v.

WAYNE ROBEY, et al.,

Defendants.

IN THE

CIRCUIT COURT

FOR

ANNE ARUNDEL COUNTY

Case No. C-02-16-001949

CV

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* * * * *

ORDER

The Defendants Wayne A. Robey, Clerk of the Circuit Court for Howard County; James F. Fitzgerald, Sheriff of Howard County; Linda H. Lamone, Administrator of the State Board of Elections; John C. Wobensmith, Secretary of State of Maryland; and Lawrence J. Hogan, Jr., Governor of Maryland's Motion to Dismiss, and any opposition thereto, having been considered, it is this 31 day of October, 2016, by the Circuit Court for Anne Arundel County,

ORDERED, that the Defendants' Motion be and is hereby GRANTED; and it is further

ORDERED, that Plaintiff's First Amended Complaint and Request for Leave to Join Necessary Parties be and is hereby DISMISSED WITH PREJUDICE.


(Mulford)

JUDGE

FILED OCT 31 2016

11/1/16 DLE

John F. McMahon v. WAYNE ROBEY, *et al.*

Joint Record Extract

10.

NOTICE OF APPEAL

(11/03/16) (R 297–303)

E076–E082

JOHN F. MCMAHON,
PLAINTIFF,

V.

WAYNE ROBEY, *et alia*,
DEFENDANTS.

*

*

*

*

IN THE
CIRCUIT COURT
FOR
ANNE ARUNDEL COUNTY

Case # C-02-CV-16-001949

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NOTICE OF APPEAL

John F. McMahon, Plaintiff, by Allen R. Dyer, his attorney, hereby appeals the Judgment of the Court in this action. The final judgment of the Court is evidenced by the attached copies of the October 31, 2016, Civil Hearing Sheet, the October 31, 2016, Order granting *Defendants' Motion to Dismiss*, and the November 1, 2016, *Declaratory Judgment* which are incorporated herein as Exhibit 1, Exhibit 2, and Exhibit 3 respectively.

On November 1, 2016, Plaintiff ordered, and requested a seven day turnaround, of the transcript of the October 31, 2016 hearing wherein Judge Mulford delivered his oral opinion as noted in Exhibit 1.

Respectfully Submitted,

_____/s/_____
Allen R. Dyer, Esq.

13340 Hunt Ridge
Ellicott City, Maryland 21042
aldyer@lawlab.com / 410-531-3965
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of November, 2016, a copy of the foregoing *Notice of Appeal* and attachments were served by electronic means via the Maryland Electronic Courts System (MDEC) to: Stuart J. Cordish, Assistant Attorney General, counsel for Defendants, at Attorney General of Maryland; Courts Unit, 20th Floor; 200 St. Paul Place; Baltimore, Maryland 21202 and Jason L. Levine, Assistant Attorney General, counsel for Defendants, at 80 Calvert Street, 4th Floor; Annapolis, Maryland 21401.

_____/s/_____
Allen R. Dyer

CERTIFICATE OF COMPLIANCE WITH RULE 1-322.1

I HEREBY CERTIFY THAT this filing was prepared in compliance with MARYLAND RULE 1-322.1.

_____/s/_____
Allen R. Dyer

JOHN F. MCMAHON,
PLAINTIFF,

*

IN THE
CIRCUIT COURT

*

FOR
ANNE ARUNDEL COUNTY

v.

*

WAYNE ROBEY, *et alia*,
DEFENDANTS.

*

Case # C-02-CV-16-001949

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LIST OF EXHIBITS

Exhibit 1	October 31, 2016	Civil Hearing Sheet
Exhibit 2	October 31, 2016	<i>Order of Dismissal</i>
Exhibit 3	November 1, 2016	<i>Declaratory Judgment</i>



Exhibit 1

**Civil Hearing Sheet
IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY**

JOHN MCMAHON
Plaintiff
(A. DYER)

Case No. C-02-CV-16-1949

Date: October 31, 2016

VS

WAYNE ROBEY, ET AL.
Defendant
(S. CORDISH/ J. LEVINE)

**Clerk: S. WEBER
4C**

Case called for Hearing on MOTION TO DISMISS

In Open Court before Judge WILLIAM C. MULFORD, II

Counsel heard. Court placed opinion on the record. Court GRANTED Defendant's Motion to Dismiss. Court signed Order in file.

Judge

JOHN F. McMAHON,

Plaintiff,

v.

WAYNE ROBEY, et al.,

Defendants.

IN THE

CIRCUIT COURT

FOR

ANNE ARUNDEL COUNTY

Case No. C-02-16-001949

CV
n

* * * * *

ORDER

The Defendants Wayne A. Robey, Clerk of the Circuit Court for Howard County; James F. Fitzgerald, Sheriff of Howard County; Linda H. Lamone, Administrator of the State Board of Elections; John C. Wobensmith, Secretary of State of Maryland; and Lawrence J. Hogan, Jr., Governor of Maryland's Motion to Dismiss, and any opposition thereto, having been considered, it is this 31 day of October, 2016, by the Circuit Court for Anne Arundel County,

ORDERED, that the Defendants' Motion be and is hereby GRANTED; and it is further

ORDERED, that Plaintiff's First Amended Complaint and Request for Leave to Join Necessary Parties be and is hereby DISMISSED WITH PREJUDICE.

(Mulford)

JUDGE

FILED OCT 31 2016

11/1/16 DLE

Exhibit 3

JOHN F. McMAHON,	*	IN THE
Plaintiff,	*	CIRCUIT COURT
v.	*	FOR
WAYNE ROBEY, et al.,	*	ANNE ARUNDEL COUNTY
Defendants.	*	
	*	Case No. C-02-CV-16-001949
* * * * *		

DECLARATORY JUDGMENT

Upon consideration of the Plaintiff's Amended Complaint, the Defendants' Motion to Dismiss, the Plaintiff's Reply, and the Court's hearing on the matter, on this 1st day of November, 2016, the Circuit Court for Anne Arundel County finds and declares:

That former Sheriff James Fitzgerald's failure to take the oath of office does not nullify the votes cast for him in the 2014 election for the office of Sheriff of Howard County;

That Plaintiff did not, by virtue of any such failure, receive the majority of all legally valid votes in said election; and

That the Plaintiff has no right or claim to the office of Sheriff of Howard County, and that only the Governor may make an appointment to a vacancy in the office of Sheriff.



The Honorable William C. Mulford II
Circuit Court Judge for Anne Arundel County

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