

VIRGINIA:

IN THE CIRCUIT COURT OF NELSON COUNTY

LARRY DALE SAUNDERS,

Petitioner

v.

Case No. CL 07000354

JOE DAN JOHNSON, et al.

DEMURRER AND MOTION TO DISMISS

David McBee, Chairperson of the Nelson County Electoral Board, by his counsel, submits this Demurrer and Motion to Dismiss with respect to the Bill of Complaint of petitioner Larry Dale Saunders. Mr. McBee respectfully submits that the Bill of Complaint is not sufficient in law and does not state facts upon which relief can be granted as to him, and that he should be dismissed with prejudice as a party to this action.

It is further submitted that naming Mr. McBee as a defendant in this action is so clearly without merit under existing law, and that no good faith argument exists for the extension, modification, or reversal of existing law, that petitioner and his counsel should be ordered to pay the amount of expenses, including attorney's fees, pursuant to Va. Code § 8.01-271.1, incurred because of the filing of the Bill of Complaint including Mr. McBee as a defendant, along with such other and further relief as is just.¹

The grounds for granting this Demurrer and Motion to Dismiss are set forth below.

1. The Bill of Complaint alleges that petitioner came in second in the general election for

¹A Summons dated December 6, 2007 was issued with respect to Mr. McBee, giving him 21 days after service to respond to the Bill of Complaint. Mr. McBee received notice of such Summons and Bill of Complaint many days later, and the undersigned counsel for Mr. McBee was retained through the Office of the Attorney General of the Commonwealth of Virginia on December 20, 2007 and first saw the Summons and Bill of Complaint on December 21, 2007.

the Nelson County Board of Supervisors, South District, held on November 6, 2007.²

2. The Bill of Complaint alleges that defendants Joe Dan Johnson, John W. Ponton, and Mary Kathryn D. Allen, were the other candidates in that election.³

3. The Bill of Complaint makes no allegation whatsoever with respect to either Mr. McBee or the Nelson County Electoral Board in any respect, merely naming Mr. McBee as a defendant in the caption.⁴

4. Not only does the Bill of Complaint make no allegation regarding Mr. McBee or the Nelson County Electoral Board – and certainly no allegation that they did anything wrong – but the Bill of Complaint seeks no relief against either Mr. McBee or the Nelson County Electoral Board. Petitioner's own pleadings demonstrate that he has no basis for naming Mr. McBee as a defendant in this proceeding, and that Mr. McBee should be dismissed with prejudice from this action.⁵

²Bill of Complaint ¶¶ 2, 6-7.

³*Id.* ¶¶ 3-5, 7.

⁴The proposed Amended Bill of Complaint, which petitioner has sought leave to file, similarly names Mr. McBee as a defendant in the caption, but does not make a single allegation as to him or the Nelson County Electoral Board in any respect anywhere in the proposed Amended Bill of Complaint.

⁵Section 8.01-273(A) of the Code of Virginia specifically states that "[i]n any suit in equity or action at law, the contention that a pleading does not state a cause of action or that such pleading fails to state facts upon which the relief demanded can be granted may be made by demurrer." Virginia courts have long held, "while a demurrer admits as true all averments of material facts which are sufficiently pleaded, it does not admit the correctness of the conclusions of law stated by the pleader Nor does a demurrer admit 'inferences or conclusions from facts not stated.'" *Arlington Yellow Cab Co. v. Transportation, Inc.*, 207 Va. 313, 317-18, 149 S.E.2d 877, 881 (1966) (affirming decision of the Circuit Court sustaining the demurrers to and dismissing the petition) (emphasis added); accord *Fox v. Custis*, 236 Va. 69, 71, 372 S.E.2d 373, 374 (1988) (affirming decision of the Circuit Court sustaining the demurrers to and dismissing

5. Moreover, the provisions of the Code of Virginia governing a proceeding to contest an election, such as this proceeding, explicitly provide that a copy of the complaint filed by the unsuccessful candidate (the "contestant") "shall be served by the contestant . . . on each *contestee* . . ." (the other candidates in the election) (emphasis added).⁶

6. The Code of Virginia also provides that, "[t]he *contestee* shall . . . after the complaint is served on him, file in the clerk's office an answer . . ." Va. Code § 24.2-809 (emphasis added).

7. Nowhere in the Code of Virginia or the common law is there any basis for naming Mr. McBee, the Chairman of the Nelson County Electoral Board, as a defendant in this proceeding, and petitioner alleges no basis in the law nor any facts for so naming Mr. McBee.

WHEREFORE, for the foregoing reasons, David McBee respectfully requests that this

three motions for judgment as inadequate because, although "a demurrer admits the truth of all well-pleaded material facts" and "[a]ll reasonable factual inferences fairly and justly drawn from the facts alleged," "a demurrer does not admit the correctness of the pleader's conclusions of law" (emphasis added).

⁶See Va. Code §§ 24.2-807-808. The Code of Virginia leaves no doubt that the term "contestee" refers to the other candidates in the election, and in no way could be interpreted to encompass the chairman of the local electoral board. See, e.g., Va. Code § 24.2-807, referring to "objections to the eligibility of the contestee" as being one of the two grounds that can provide a basis for a complaint commencing an election contest proceeding. *Yeatts v. Murray*, 249 Va. 285, 288, 455 S.E.2d 18, 20 (Va. 1995) ("the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction").

While in the construction of statutes the constant endeavor of the courts is to ascertain and give effect to the intention of the legislature, that intention must be gathered from the words used, unless a literal construction would involve a manifest absurdity. Where the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed.

Barr v. Town & Country Props., Inc., 240 Va. 292, 295, 396 S.E.2d 672, 674 (Va. 1990).

Court grant his Demurrer and Motion to Dismiss and dismiss this action as to him with prejudice, along with such other and further relief as is just, including an award against petitioner and petitioner's counsel, pursuant to Va. Code § 8.01-271.1, of the expenses, including attorney's fees, incurred because of the filing of the Bill of Complaint including Mr. McBee as a defendant.

Defendant David McBee

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