Circuit Court for Prince George's County
Case No. CAP-19-19930

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 988

September Term, 2020

KORY WHITMORE

v.

MICHELLE RIVEST, ET AL

Graeff,
Shaw Geter,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: September 28, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This is an appeal from a judgment without prejudice entered by the Circuit Court for Prince George's County. Appellee, Prince George's County Office of Child Support Enforcement, filed a complaint under the Family Law Article against appellant, Kory Whitmore, seeking to establish his paternity of Michelle Rivest's child and to obtain a court order for child support. At the conclusion of a hearing held on October 13, 2020, the court granted appellant's motion for judgment, but did so without prejudice to allow appellee to refile the case. Appellant timely appealed and presents two questions for our review.

1. In a Maryland paternity suit, after the Plaintiff has rested her case and Defendant has moved for judgment under Maryland Rule 2-519, may a trial judge enter a "Judgment" which orders "that Plaintiff's Complaint is hereby denied without prejudice?"
2. Assuming, for purposes of argument only, that a trial judge may enter such a Judgment, was to do so an abuse of discretion on the facts of the instant case?

For reasons set forth below, we affirm.

BACKGROUND

On August 22, 2019, the Prince George's County Office of Child Support Enforcement filed a complaint *ex relatione* against Whitmore on behalf of Rivest and her minor son. A virtual hearing was held before a magistrate on July 28, 2020. During this hearing, Whitmore indicated that he did not wish to admit paternity, nor did he want to submit to DNA testing. The magistrate then continued the matter for a hearing before a judge because the magistrate was not authorized to issue an order requiring Whitmore to submit to paternity testing.

On September 11, 2020, a circuit court judge held a hearing on the matter. Rivest testified on direct examination that she had been in a romantic relationship with Whitmore starting in February of 2018 and that in May and June of 2018, she had sexual intercourse with him. Rivest stated that she had not had sexual intercourse with anyone else during this time period. At the end of June 2018, Rivest discovered she was pregnant and informed Whitmore. According to Rivest, after she told Whitmore about her pregnancy, he held himself out as the child's father and told members of his family about her pregnancy. Rivest further testified that she had a number of conversations with Whitmore's mother about the child.

On cross examination, appellant asked Rivest if she had been married and to whom. Rivest responded that her ex-husband's name is Cory Wiley. Appellant then asked if Rivest and Wiley had "actually gotten a judgment of absolute divorce," and Rivest responded that they had not. Appellee presented no other witnesses, and appellant then made a motion for judgment.

Appellant argued that because Rivest was married at the time of her son's birth, her son was not "born out of wedlock," and the Paternity Provisions of the Family Law Article that formed the basis of the complaint did not apply. Appellant argued that an order for DNA testing, under such circumstances, may only be required under the Estates and Trusts Article, and Rivest's husband would have the option to rebut the presumption of paternity. If he did so, appellee would have to show that DNA testing of Whitmore would be in the best interest of the child. Appellee requested that the matter be held in abeyance so that

she could review the case law cited by appellant, and the trial judge granted appellee one week to "brief this issue."

On September 17, 2020, appellee filed a motion asking that "the court dismiss the case without prejudice" because "a dismissal without prejudice would serve the child's best interests." Four days later, appellant filed an opposition to the motion and requested that his motion also be considered a memorialization of the oral Motion for Judgment made at trial and a Rule 2-519(b) Motion for Judgment. These motions argued that the circuit court did not have the power "to dispose of a case without prejudice after the Plaintiff had rested and Defendant had then moved for judgment." The opposition motion contended that the court could not dismiss the action under Rule 2-506 because "Rule 2-506 is a pre-trial rule." On September 30, 2020, appellee filed a response noting that Rule 2-506 allows a court to dismiss a case "upon such terms and conditions as the court deems proper." Md. Rule 2-506(c). The motion again argued that failing to dismiss the case without prejudice would not be in the best interest of the child.

On October 7, 2020, the court issued an oral ruling granting appellant's Motion for Judgment, without prejudice "to the Office of Child Support to rebring the action." The court entered a written judgment to that effect on the same day.

STANDARD OF REVIEW

Because "provisions of the Maryland Code[] and the Maryland Rules are appropriately classified as questions of law," we review the trial court's interpretation of Maryland statutes and rules *de novo*. *Davis v. Slater*, 383 Md. 599, 604 (2004).

We review a decision of a trial court to grant or deny a voluntary dismissal under an abuse of discretion standard. *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 417–18 (2007). "Under . . . Rule 2–506, the granting of a motion for voluntary dismissal is within the court's discretion, after weighing the equities and giving due regard to all pertinent factors." *Owens-Corning Fiberglas Corp v. Fibreboard Corp.*, 95 Md. App. 345, 349–50 (1993).

DISCUSSION

Appellant contends that a trial court judge does not have the authority to enter a judgment "without prejudice," and this lack of authority means that the paternity suit must necessarily be resolved in his favor because the denial of appellee's complaint acted as a final declaration regarding paternity. Appellant further asserts that even if the trial court judge did have the authority to enter a judgment without prejudice, doing so here constituted an abuse of discretion.

Appellee argues that the denial of the paternity complaint without prejudice was proper, the circuit court order was in the child's best interest, and the trial judge did not abuse his discretion by granting the judgment.

Judgment without Prejudice

The Maryland Rules define a judgment as "any order of court final in its nature entered pursuant to these rules." Md. Rule 1-202(o). An order dismissing a case without prejudice is an order that "has the effect of terminating an action in a circuit court." *R.J. Reynolds Tobacco Co. v. Stidham*, 448 Md. 497, 512 (2016). "The general, overarching

rule is that an order that has the effect of terminating an action in a circuit court is a final, appealable judgment." *Id.*

In his oral ruling, the trial judge stated that he was granting appellant's Motion for Judgment without prejudice "to the Office of Child Support to rebring the action." The judge also stated that "under the circumstances of this case . . . it would be in the child's best interest to establish paternity in this matter, for the purposes of the issuance of a child support order. . . . So I am not going to grant judgment with no further right for the Office of Child Support to pursue this matter."

In our view, these statements by the judge clearly indicate that the court was, in essence, dismissing the case to allow the Office of Child Support to pursue the matter by incorporating language from the Estates and Trusts Article. Prior to granting the motion, the court had not made any findings of fact and there had been no final adjudication on the merits. We observe that while it may have been inartful to state that the judgment was without prejudice, as there is no specific language in the Rules regarding that type of disposition, in effect, the judge determined that the case would be terminated by an order that effectively allowed appellee to reinstitute the proceedings under the proper statute. Such a dismissal is well within the realm of the court's authority under Maryland Rule 2-506 which states:

> (c) **By Order of Court.** Except as provided in section (a) of this Rule, a party who has filed a complaint, counterclaim, cross-claim, or third-party claim may dismiss the claim only by order of court and *upon such terms and conditions as the court deems proper*. If a counterclaim has been filed before the filing of a plaintiff's motion for voluntary dismissal, the action shall not be dismissed over the objection of the party

> who filed the counterclaim unless the counterclaim can remain pending for independent adjudication by the court.

Md. Rule 2-506(c) (emphasis added).

Appellant argues that the Rule only applies to pretrial matters, and his argument seems to stem from a set of headnotes that categorize the Rule as a part of "pretrial procedure." *See Wilcox v. Orellano*, 443 Md. 177 (2015). He cites *Wilcox v. Orellano*. However, the Wilcox opinion, a medical malpractice case, merely states that "[a]fter an answer has been filed, the plaintiff can accomplish a voluntary dismissal only by obtaining the defendant's assent or the court's permission." *Id.* at 181. We note Rule 2-506(c) clearly provides that a dismissal is proper "upon such terms and conditions as the court deems proper." Md. Rule 2-506(c).

In our view, the court mischaracterized its conclusion and essentially entered a dismissal without prejudice when it entered a judgment without prejudice.

Res Judicata

Appellant also argues that the entry of a judgment without prejudice violates *res judicata* principles because it would allow a plaintiff to retry a case "having been educated about the defects in his or her case." To support his argument, appellant cites *Felger v. Nichols*, where this court stated:

> In Maryland, the doctrine of res judicata, or estoppel by judgment has two branches: direct estoppel by judgment, and collateral by judgment. The doctrine of direct estoppel by judgment is established, when in a subsequent action between the same parties upon the same of action, claim or demand, or subject matter, a judgment is rendered on the merits. The judgment constitutes an absolute bar, not only as to all matters which were actually raised, litigated and determined

> in the former proceeding, but also as to all matters which could have been raised.

Felger v. Nichols, 35 Md. App. 182, 183 (1977). The second branch of *res judicata*, collateral estoppel by judgment is established when "a second action between the same parties is [based] upon a different 'cause of action.'" *Id.* "[T]he judgment in the previous action operates as a bar only as to those matters actually litigated and determined in the original action." *Id.*

In the case at bar, no judgment was rendered on the merits. In addition, appellant's argument is premature as this is an appeal of the initial proceeding.

Abuse of Discretion

In his brief, appellant concedes that "the practical result (of the judgment) was the same as if the Motion to Dismiss had been granted and the Motion for Judgment had been denied." He then states, "the second question presented must be analyzed as if he had granted the Motion to Dismiss without prejudice." We observe that both parties agree that when analyzing whether the dismissal of a claim without prejudice was proper, the appellate court must utilize the abuse of discretion standard. The abuse of discretion standard is "premised, at least in part, on the concept that matters within the discretion of the trial court are 'much better decided by the trial judges than by appellate courts....'" *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 417–18 (2007) (quoting *Wilson v. John Crane, Inc.*, 385 Md. 185, 198–99 (2005)). "A reviewing court will not disturb findings that fit squarely within the discretion of the trial court, unless the decision under review is 'well removed from any center mark imagined by the reviewing court and beyond the

fringe of what the court deems minimally acceptable.'" *In re R.S.*, 470 Md. 380, 398 (2020) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 313 (1997)).

Whether a party is entitled to voluntary dismissal without prejudice is resolved traditionally by analysis according to four factors: (1) the non-moving party's effort and expense in preparing for litigation; (2) excessive delay or lack of diligence on the part of the moving party; (3) sufficiency of explanation of the need for a dismissal without prejudice; and (4) the present stage of the litigation, i.e., whether a motion for summary judgment or other dispositive motion is pending." *Aventis Pasteur, Inc.*, 396 Md. at 420.

We shall apply this analysis to the present case. As to the first factor, appellant notes that he was required to appear at three hearings and pay for counsel to represent him. Appellee argues that appellant's effort was minimal because these hearings were all virtual, were short in duration, and could have been avoided if appellant had raised Rivest's marriage in his answer rather than waiting until the hearing. We agree and hold that this factor weighs in favor of appellee.

Regarding the second and third factors, appellant contends that appellee was not diligent as it was not aware of Rivest's marital status and there was an excessive delay in bringing the case and in requesting the dismissal. Appellee argues that "Rivest is not their client,[1]" and appellee filed a motion to voluntarily dismiss shortly after learning that she was still married. We note that these proceedings were held during the COVID-19

[1] Appellant repeatedly contends that Rivest is appellee's client. She is not. Md. Ann. Code Fam. Law § 10-115(e) (2021). Further, in Maryland, a child cannot be penalized for the conduct of the Office of Child Support Enforcement. *Early v. Early*, 338 MD. 639, 660 (1995) ("The duty of support runs to the child.").

pandemic, and while there was delay, we hold it was not excessive. Further, appellee provided a sufficient reason for the dismissal request.

The final factor evaluates the stage of the proceedings, i.e., whether a dispositive motion is pending. This factor weighs in favor of the appellant because there was a pending motion for judgment. However, our analysis examines the totality of the circumstances and, thus, one factor, alone is not dispositive.

Based on our review, we hold granting the motion for dismissal was proper and was not an abuse of discretion. Appellant did not incur substantial litigation expenses, nor did he expend significant resources in defending this matter. Appellee did not lack diligence in pursuing the matter and acted promptly to seek dismissal after receiving the information of Rivest's marital status. We note also, that, because this was a Family Law matter, the court was required to act in the best interest of the child.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY THE APPELLANT.