

Circuit Court for Allegany County
Case No: 01-C-12-036780

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND*

No. 1732

September Term, 2023

IN THE MATTER OF WAYNE RESPER

Nazarian,
Albright,
Kehoe, Christopher B.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, C., J.

Filed: April 21, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

The issue in this case is whether we should grant Wayne Resper’s application for leave to appeal a judgment of the Circuit Court for Allegany County which was entered on September 26, 2023. For the reasons that follow, we will deny his application.

Background

This case has its origins in a petition for judicial review filed by Mr. Resper in the Circuit Court for Allegany County on February 24, 2012.¹ In his petition, Mr. Resper sought review of a decision by the Inmate Grievance Office² (the “IGO”) that dismissed as untimely a grievance he had filed. The Department of Public Safety and Correctional Services (the “Department”) filed a motion for disposition without a hearing. The circuit court granted the motion on August 23, 2012. The court also affirmed the IGO’s dismissal of the grievance and declared that the action filed by Mr. Resper was “frivolous” under Maryland’s Prison Litigation Act (the “PLA”), specifically Maryland Code, Cts. & Jud. Proc. § 5-1005(a).³ In determining that the action was frivolous, the

¹ At all relevant times, Mr. Resper was incarcerated in either the Western Correctional Institution or the North Branch Correctional Institution. Both facilities are located in Allegany County.

² Effective October 1, 2023, the IGO was renamed the Incarcerated Individual Grievance Office (“IIGO”). *See* 2023 Md. Laws, ch. 721.

³ The PLA is codified at Cts. & Jud. Proc. §§ 5-1001–07. Section 5-1005 provided then, as it does now:

- (a) A court may include in its final order or judgment in any civil action a finding that the action was frivolous.
- (b) A finding under subsection (a) of this section shall be reflected in the docket entries of the case.

(continued)

court took notice of the fact that Mr. Resper had “filed 74 administrative agency appeal cases . . . within the past 12 months” and that, given his “prolific filing, he has the experience to timely file his grievances at the administrative level.”

Mr. Resper filed a notice for in banc review. The Department moved to dismiss the petition on the grounds that in banc review was not permitted under Maryland law. The court granted the motion to dismiss on October 25, 2012. The docket entries do not show any further filings or actions in this case until 2023.

On September 7, 2023, Mr. Resper filed a “Motion to Rescind Order Requiring Leave of Court to File Actions.” He argued, among other things, that the denial of his request for in banc review improperly impeded his right to access the court system. He requested that the court “rescind its order” requiring him to seek leave of court before filing actions. In a written order filed on September 26, 2023, the circuit court denied the motion because Mr. Resper had been “declared a ‘frivolous filer’ under [Cts. & Jud. Proc.] § 5-1005(a) prior to the filing of this action.”

On November 2, 2023, Mr. Resper filed an application for leave to appeal in this Court and the circuit court. On the next day, the circuit court issued an order declining to

(c)(1) A prisoner who has filed three or more civil actions that have been declared to be frivolous by a court of this State or a federal court for a case originating in this State may not file any further civil actions without leave of court.

(2) If a prisoner has filed three or more civil actions that have been declared to be frivolous by a court of this State or a federal court for a case originating in this State, a court may place the prisoner’s remaining and future civil actions on an inactive case list and permit the prisoner to pursue only one civil action at a time, regardless of jurisdiction.

grant him leave to appeal. In light of the circuit court’s decision, this Court ordered this case to be “administratively closed.”

Mr. Resper then filed a petition for a writ of certiorari in the Supreme Court of Maryland. On March 25, 2024, the Supreme Court entered an order that granted the petition for certiorari, vacated this Court’s decision, and remanded the case to this Court for further proceedings. The Supreme Court’s order stated in pertinent part:

The Appellate Court treated the circuit court’s November 3 order as effectively striking the petitioner’s application for leave to appeal. Accordingly, the Clerk of the Appellate Court issued an order administratively closing the case. Mr. Resper then sought review in this Court pursuant to a petition for writ of certiorari.

After initial consideration of the petition, the Court requested that the Department of Public Safety and Correctional Services respond to the following question: “Whether the Court should issue a writ of certiorari on the question of whether Md. Code Ann., Cts. & Jud. Proc. § 5-1005 applies to notices of appeal.” The Department submitted a response in which its primary argument was that this Court lacked jurisdiction to entertain the petition.^[4] The Department argued that this Court should consider the

⁴ Cts. & Jud. Proc. § 12-202 states (emphasis added):

A review by way of certiorari may not be granted by the Supreme Court of Maryland in a case or proceeding in which the Appellate Court of Maryland has denied or granted:

- (1) Leave to prosecute an appeal in a post conviction proceeding;
- (2) Leave to appeal from a refusal to issue a writ of habeas corpus sought for the purpose of determining the right to bail or the appropriate amount of bail;
- (3) *Leave to appeal in an incarcerated individual grievance commission proceeding;*
- (4) Leave to appeal from a final judgment entered following a plea of guilty in a circuit court; or
- (5) Leave to appeal from an order of a circuit court revoking probation.

Appellate Court’s action as a denial of an application for leave to appeal, which is not subject to further review in this Court. *See Mahai v. State*, 474 Md. 648 (2021). However, the Appellate Court did not consider Mr. Resper’s application for leave to appeal at all, much less exercise its discretion to deny the application. Instead, the Appellate Court administratively closed the case based on the circuit court’s order declining to grant leave to appeal.

In footnote 4 of the Department’s answer to the petition, the Department acknowledged that the circuit court lacked the authority to deny Mr. Resper’s filing “on the purported § 5-1005 grounds or otherwise.” The Department explained:

[T]he appellate court has the power to deny an application for leave to appeal under Rule 8-204.^[5] Even if treated as a notice of appeal, Rule

⁵ Rule 8-204 states in pertinent part:

Application for Leave to Appeal to the Appellate Court

(a) **Scope.** — This Rule applies to applications for leave to appeal to the Appellate Court.

(b) **Application.** —

(1) **How Made.** — An application for leave to appeal to the Appellate Court shall be filed in duplicate with the clerk of the lower court.

(2) **Time for Filing.** —

(A) **Generally.** — Except as otherwise provided in subsection (b)(2)(B) of this Rule, the application shall be filed within 30 days after entry of the judgment or order from which the appeal is sought.

* * *

(f) **Disposition.** — On review of the application, any response, the record, and any additional information obtained pursuant to section (e) of this Rule, without the submission of briefs or the hearing of argument, the Court shall:

- (1) deny the application;
- (2) grant the application and affirm the judgment of the lower court;
- (3) grant the application and reverse the judgment of the lower court;

(continued)

8-203 grants power to the circuit court to strike notices of appeal for four reasons that are procedural or ministerial in nature. A circuit court is not permitted “to preclude review of its own decision by striking an appeal because it believes . . . that the appellant is not entitled to take the appeal, or for any other reason . . . other than the four articulated in Rule 8-203[.]” *County Comm’rs of Carroll County v. Carroll Craft Retail, Inc.*, 384 Md. 23, 42 (2004). In all other cases, “it is the appellate court that must order the dismissal.” *Id.* None of the reasons enumerated in Rule 8-203 were invoked here.

This Court agrees that the circuit court lacked the authority to deny or strike Mr. Resper’s application for leave to appeal pursuant to § 5-1005 of the Courts & Judicial Proceedings Article.

Accordingly, upon consideration of the petition and the response, it is this 25th day of March 2024, by the Supreme Court of Maryland,

ORDERED that the petition is granted; and it is further

ORDERED that the order of the Appellate Court of Maryland administratively closing the appeal record is vacated; and it is further

ORDERED that this case is remanded to the Appellate Court with instructions to vacate the circuit court’s November 3, 2023 order and direct the circuit court to transmit the record on appeal. Thereafter, the Appellate Court can address Mr. Resper’s application for leave to appeal in the ordinary course.

Resper v. Sec’y, Dep’t of Pub. Safety & Corr. Servs., 486 Md. 613, 614–15 (2024).

(4) grant the application and remand the judgment to the lower court with directions to that court; or

(5) grant the application and order further proceedings in the Appellate Court in accordance with section (g) of this Rule.

* * *

(g) Further proceedings in the Appellate Court. —

(1) Generally. — Further proceedings directed under subsection (f)(5) of this Rule shall be conducted pursuant to this Title and as if the order granting leave to appeal were a notice of appeal filed pursuant to Rule 8-202. . . .

The circuit court has transmitted the record of this case to this Court. Our review of the record convinces us that Mr. Resper’s case fails on both procedural and substantive grounds.

Analysis

In his Informal Brief, Mr. Resper asks us to reverse and vacate “the judgments of the circuit court relied upon to impose the frivolous filer designation, erasing its restrictions and allowing [him] to petition the court for entitlement of remedy flowing from multiple appeals erroneously dismissed as untimely.” This contention is unpersuasive for several reasons. We will focus on two of them.

A. Mr. Resper has not demonstrated that the 2012 judgment was tainted by fraud, mistake, or irregularity.

The authority for the court’s revisory power is found in parallel provisions of the Maryland Code and the Maryland Rules. Cts. & Jud. Proc. § 6-408 states:

For a period of 30 days after the entry of a judgment, or thereafter pursuant to motion filed within that period, the court has revisory power and control over the judgment. After the expiration of that period the court has revisory power and control over the judgment only in case of fraud, mistake, irregularity, or failure of an employee of the court or of the clerk’s office to perform a duty required by statute or rule.

Similarly, Maryland Rule 2-535 provides:

(a) **Generally.** — On motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534.

* * *

(b) **Fraud, mistake, irregularity.** — On motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity.

The existence of fraud, mistake, or irregularity must be shown by clear and convincing evidence. *Pelletier v. Burson*, 213 Md. App. 284, 290 (2013). The terms fraud, mistake, and irregularity are “‘narrowly defined and strictly applied . . . in order to ensure finality of judgments.’” *Id.* (quoting *Thacker v. Hale*, 146 Md. App. 203, 217 (2002)).

In the context of Md. Rule 2-535(b), the term “fraud” means extrinsic fraud, not intrinsic fraud. *Jones v. Rosenberg*, 178 Md. App. 54, 72 (2008). “Fraud is extrinsic when ‘it actually prevents an adversarial trial but is intrinsic when it is employed during the course of the hearing which provides the forum for the truth to appear, albeit, the truth was distorted by the complained of fraud.’” *Id.* at 73 (quoting *Manigan v. Burson*, 160 Md. App. 114, 121 (2004)).

In the context of Rule 2-535(b), the term “mistake” refers only to a jurisdictional error, such as where the court lacks the power to enter the judgment. *See Peay v. Barnett*, 236 Md. App. 306, 322 (2018); *Pelletier*, 213 Md. App. at 291.

Finally, and again in the context of Rule 2-535(b), the term “irregularity” means “‘a nonconformity of process or procedure.’” *Pelletier*, 213 Md. App. at 290 (quoting *Davis v. Att’y Gen. of Md.*, 187 Md. App. 110, 125 (2009)). Irregularity typically involves “a failure to provide required notice to a party[.]” *Mercy Med. Ctr., Inc. v. United Healthcare of the Mid-Atl., Inc.*, 149 Md. App. 336, 375-76 (2003) (cleaned up).

Returning to the case before us, Mr. Resper contends that: (1) his designation as a frivolous filer under the PLA was erroneously based on grievances that were improperly dismissed on the ground that they were untimely, (2) he was not permitted to submit evidence that his mail was mishandled, (3) he was wrongfully denied a hearing, and (4) the circuit court should have remanded his case for an administrative hearing as it had done in other cases brought by other inmates.

Mr. Resper could have presented his current arguments to the circuit court if he had filed a motion in the circuit court asking it to reconsider its judgment under Rule 2-534 or Rule 2-535(a), but no such motion was filed. No revisory motion was filed within ten days of the circuit court's order. Mr. Resper's "Motion to Rescind Order Requiring Leave of Court to File Actions" was filed more than *eleven years* after the 2012 order was filed. Thus, the remedial path provided by Rule 2-535(a) is no longer available to him.

Moreover, none of the contentions raised in his motion are a sufficient basis for a court to conclude that the 2012 judgment of the circuit court was tainted by fraud, mistake or irregularity, as those terms are defined in the context of Md. Rule 2-535(b). We conclude that the circuit court did not abuse its discretion in denying Mr. Resper's "Motion to Rescind Order Requiring Leave of Court to File Actions."

B. Mr. Resper failed to timely file his grievance with the IGO.

Even if Mr. Resper's "Motion to Rescind Order Requiring Leave of Court to File Actions" was sufficient to warrant the exercise of revisory power, he would fare no better. The IGO, now known as the IIGO, is permitted to adopt regulations governing the conduct of proceedings under subtitle 10 of the Correctional Services ("Corr. Servs.")

article of the Maryland Code. *See* Corr. Servs. § 10-204 (“Subject to the approval of the Secretary, the Office may adopt regulations governing the conduct of its proceedings under this subtitle.”). An individual confined in a correctional facility in the Division of Correction may submit a complaint to the IGO/IIGO “within the time and in the manner required by regulations adopted by the” IGO/IIGO. Corr. Servs. § 10-206(a). The regulation pertinent to Mr. Resper’s case provided, as it does now, that:

If the grievance is based on an appeal from the administrative remedy procedure, a grievant shall file the grievance within 30 days of the date that the:

- (1) Grievant received the Commissioner’s response concerning the appeal;
- or
- (2) Commissioner’s response to the appeal was due to the grievant.

COMAR 12.07.01.05B.

“A time limitation or procedural bar may be waived for a grievance which represents a continuing problem or for which good cause is shown for a failure to proceed in a timely fashion.” COMAR 12.07.01.05F. If the “grievance is not filed within the time constraints and does not meet the exceptions under” COMAR 12.07.01.05, the Executive Director shall dismiss it “on preliminary review as wholly lacking in merit[.]” COMAR 12.07.01.06B(3).

The record before us shows that on or about January 24, 2010, Mr. Resper filed with the warden of the North Branch Correctional Institution a complaint under the Department of Correction’s administrative remedy procedure. Mr. Resper did not receive a response from the warden. On March 10, 2010, he filed an appeal to the Commissioner of Corrections. That appeal was received by the Commissioner on March 16, 2010. Six

days later, on March 22, 2010, the Commissioner notified Mr. Resper that his appeal was not accepted for processing because he had not used the appropriate forms. Therefore, Mr. Resper was required to file his grievance with the IGO by April 21, 2010, this is, within thirty days of the Commissioner’s decision. *See* COMAR 12.07.01.05B. But Mr. Resper did not file his grievance until more than a year and a half later, on November 30, 2011. The IGO/IIGO properly dismissed the grievance as untimely.

We conclude that the circuit court did not err when it denied Mr. Resper’s “Motion to Rescind Order Requiring Leave of Court to File Actions.” Therefore, we deny his motion for leave to appeal from the court’s judgment.

**THE APPLICATION FOR LEAVE TO
APPEAL IS DENIED. ANY COSTS TO
BE PAID BY APPELLANT.**