

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1257

September Term, 2014

DAVID WISNIEWSKI

v.

MARTIN O'MALLEY, GOVERNOR et al.

Eyler, Deborah S.,
Hotten,
Nazarian,

JJ.

Opinion by Hotten, J.

Filed: July 15, 2015

*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.

Appellant, David Wisniewski, filed a complaint in the Circuit Court for Cecil County seeking a civil trial and relief against appellees, former Governor Martin O’Malley, former Attorney General Douglas Gansler, and Department of Juvenile Services employee John Horwat (“Mr. Horwat”). Prior to an answer being filed, appellant filed a second complaint alleging again that appellees allowed “Fraud, Corruption and Child [A]buse” to occur in the juvenile services system. Thereafter, appellees filed a motion to consolidate the two cases and a motion to dismiss, or in the alternative, for summary judgment, for failure to state a claim upon which relief could be granted and *res judicata*. The circuit court granted appellees’ motion and dismissed the complaints. Appellant appealed and presents one question for our consideration, which we have rephrased for clarity¹:

- I. Whether the circuit court erred when it granted appellees’ motion to dismiss?

For the foregoing reasons, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL HISTORY

On November 10, 2010, appellant was hired by the Department of Juvenile Services (“DJS”). On December 12, 2010, appellant filed with the Department of Budget and Management (“DBM”) against DJS pursuant to the Maryland Whistleblower Law,

¹ Appellant’s original question presented for appeal stated:

- I. Doesn’t the law and fairness allow me the right to an impartial Judge? Shouldn’t the public have the right to know the system Governor O’Malley and Attorney General Gansler allowed under their terms to cover up corruption, child abuse and fraud.

Maryland Code (1993 Repl. Vol. 2009), §§ 5-301 to 5-314 of the State Personnel & Pensions Article [hereinafter “State Pers. & Pens.”].

The DBM dismissed appellant’s complaint on February 10, 2011 and subsequently appellant’s employment was terminated by DJS March 9, 2011. Thereafter, appellant appealed his complaint and termination to the Office of Administrative Hearings (“OAH”) in April 2011. The OAH held a hearing in which it sustained appellant’s termination and dismissed the complaint as untimely.

On December 10, 2011, appellant filed a petition for judicial review in the Circuit Court for Cecil County regarding the OAH’s decision to sustain his termination.² He filed a second petition on December 11, 2011, challenging the OAH’s dismissal of his complaint. On March 1, 2013, the circuit court dismissed the second petition and appellant appealed to this Court. We dismissed the appeal and issued a mandate on February 4, 2014.

On November 19, 2013, appellant filed a complaint in the Circuit Court for Cecil County alleging the DJS filed false reports to conceal corruption, fraud, and child abuse. Thereafter, appellant filed a second complaint on February 4, 2014, including former Governor O’Malley, former Attorney General Gansler, and Mr. Horwat as defendants, requesting that they “uphold the law” and that he “be reinstated in the same or similar state job and receive all back pay and benefits.”

² Appellant voluntarily dismissed this petition.

On April 4, 2014, appellees filed a motion to consolidate the two complaints, pursuant to Md. Rule 2-503(a)(1),³ which the circuit court granted. Additionally, appellees filed a motion to dismiss, or in the alternative, motion for summary judgment for failure to state a claim upon which relief could be granted and because of the doctrine of *res judicata*. The circuit court granted appellees' motion and dismissed the complaints. Appellant noted a timely appeal. Additional facts shall be provided, *infra*, to the extent they prove relevant in addressing the issues presented.

STANDARD OF REVIEW

The standard for the grant of a motion to dismiss is “whether the trial court was legally correct.” *Puppolo v. Adventist Healthcare, Inc.*, 215 Md. App. 517, 530 (2013) (quoting *Schisler v. State*, 177 Md. App. 731, 742 (2007)). Furthermore, this Court “will affirm a circuit court’s judgment on any ground adequately shown by the record, even one upon which the circuit court has not relied or one that the parties have not raised.” *Barnes v. Greater Baltimore Med. Ctr., Inc.*, 210 Md. App. 457, 471 (2013) (quoting *Pope v. Board of Sch. Comm’rs*, 106 Md. App. 578, 591 (1995)).

³ Md. Rule 2-503(a)(1) states:

When actions involve a common question of law or fact or a common subject matter, the court, on motion or on its own initiative, may order a joint hearing or trial or consolidation of any or all of the claims, issues, or actions. An action instituted in the District Court may be consolidated with an action pending in a circuit court under the circumstances described in Code, Courts Article, § 6-104(b). The court may enter any order regulating the proceeding, including the filing and serving of papers, that will tend to avoid unnecessary costs or delay.

Under Md. Rule 2-322(b)(2), a party may seek dismissal of a complaint if it fails “to state a claim upon which relief may be granted[.]” Upon review of an appeal from a dismissal for failure to state a claim, we “must assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them, and order dismissal only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff, *i.e.*, the allegations do not state a cause of action for which relief may be granted.” *Parks v. Alparma, Inc.*, 421 Md. 59, 72 (2011) (quoting *RRC Northeast, LLC v. BAA Maryland, Inc.*, 413 Md. 638, 643 (2010) (citations omitted)). “The well-pleaded facts setting forth the cause of action must be pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice.” *Parks*, 421 Md. 59, 72 (2011) (quoting *RRC Northeast, LLC*, 413 Md. at 644).

DISCUSSION

I.

Appellant’s argument presented on appeal is regarding the circuit court’s decision to dismiss the claims. For the first time, appellant alleges that the court was biased and that its decision was not impartial because former Governor O’Malley appointed the presiding judge to the bench when he was previously employed by the Attorney General’s Office. Appellant asserts that this case should be reversed and remanded to the circuit court for a new trial. However, appellant’s contentions were untimely and appellant failed to provide specific facts which established that the judge’s decision was biased and prevented him from obtaining a fair trial.

In order to commence the recusal procedure, a motion must be timely filed. *Surratt v. Prince George's County, Md.*, 320 Md. 439, 468 (1990). In order to avoid “the possible withholding of a recusal motion as a weapon to use only in the event of some unfavorable ruling, the motion generally should be filed as soon as the basis for it becomes known and relevant.” *Id.* at 468-69. In the case at bar, appellant never filed a motion for recusal and instead presented this argument on appeal. Even if appellant had timely filed a motion, his argument would still have no merit.

In Maryland, the question of recusal is originally determined by the judge whose recusal is sought. *Id.* at 464 (citations omitted). “When bias, prejudice or lack of impartiality is alleged, the decision is a discretionary one, unless the basis asserted is grounds for mandatory recusal. It will be overturned only upon a showing of abuse of discretion.” *Id.* at 465 (citations omitted). Accordingly, the standard we apply is an objective one of “whether a reasonable member of the public knowing all the circumstances would be led to the conclusion that the judge’s impartiality might reasonably be questioned.” *Id.* (quoting *In re Turney*, 311 Md. 246, 253 (1987) (citations omitted)). Furthermore, a motion for recusal “must set forth facts in reasonable detail sufficient to show the purported personal misconduct; mere conclusions as to lack of impartiality will not suffice. And it should be supported by affidavit or testimony or both.” *Surratt*, 320 Md. at 467 (footnote omitted).

Judges “occupy a distinguished and decisive position . . . [requiring them] to maintain high standards of conduct.” *Jefferson-El v. State*, 330 Md. 99, 106 (1993) (citations omitted). In the case at bar, appellant failed to present specific facts which

establish that Judge Whelan was biased or lacked impartiality. Therefore, this claim must fail.

The circuit court was legally correct in its decision to dismiss appellant's complaints because they did not state a claim upon which relief could be granted. Appellant's complaints contained conclusory statements regarding appellees' alleged conspiracy to "cover up corruption, fraud and child abuse" without an outline of detailed facts or events necessary to support his claims.

Appellees assert that the doctrine of *res judicata*⁴ would also bar appellant's claims. The elements of *res judicata*, or claim preclusion, are:

(1) that the parties in the present litigation are the same or in privity with the parties to the earlier dispute; (2) that the claim presented in the current action is identical to the one determined in the prior adjudication; and, (3) that there has been a final judgment on the merits.

Anne Arundel County Bd. of Educ. v. Norville, 390 Md. 93, 107 (2005).

Appellant brought claims against appellees concerning his termination and his violations pursuant to Maryland Whistleblower law in 2011. Thereafter, appellant appealed his complaint to the OAH and Circuit Court for Cecil Court, both of which sustained the termination and dismissed the complaint. Appellant appealed to this Court and we dismissed the appeal and issued a mandate. This current action involves the same

⁴ "The doctrine of *res judicata* bars the relitigation of a claim if there is a final judgment in a previous litigation where the parties, the subject matter and causes of action are identical or substantially identical as to issues actually litigated and as to those which could have or should have been raised in the previous litigation. *Res judicata* protects the courts, as well as the parties, from the attendant burdens of relitigation." *Anne Arundel County Bd. of Educ. v. Norville*, 390 Md. 93, 106-07 (2005).

parties and arose from previous claims that resulted in a final judgment. Therefore, appellant's claims are subject to *res judicata*. Thus, appellant was barred from presenting his claims again.

Upon review, appellant has not stated any significant facts that would warrant reversal of the dismissal of his complaints. Appellant has failed to distinguish this current action from his previous claims and give sufficient evidence of judicial bias. The circuit court correctly dismissed the claims. Accordingly, we shall affirm.

**JUDGMENT OF THE CIRCUIT
COURT FOR CECIL COUNTY IS
AFFIRMED. COSTS TO BE PAID
BY APPELLANT.**