Circuit Court for Howard County
Case No.: C-13-CV-19-000657

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 417

September Term, 2021

IN THE MATTER OF DOREEN SHING

Reed,
Tang,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: May 17, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

**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, Doreen Shing, filed a notice of appeal after an in banc panel of the Circuit Court for Howard County sua sponte dismissed her in banc review. Ms. Shing, who is self-represented, asserts several issues on appeal, which, in the score of this appeal, can be distilled to one: Did the in banc panel err in dismissing the in banc review?[1] For the reasons we discuss, we shall vacate the judgment and remand to the circuit court.

[1] As phrased in her brief, Ms. Shing's issues presented are:

1. The in banc panel abused their discretion and caused undue hardship to the disabled appellant in violation of Title II of the ADA, DD Act of 2000, [and] Md. [Code Ann., Health-Gen §§] 7-102, 7-103 and 7-707.
2. The in banc panel was out-of-bounds and abused their discretion in ignoring the appellant's request for reasonable (Title II) accommodations under the ADA, DD Act of 2000, [and] Md. [Code Ann., Health-Gen §§] 7-102, 7-103 and 7-707.
3. The in banc panel abused their discretion in ignoring the appellant's due diligence efforts to mail the memoranda with exhibits and the USPS's proven loss of the memoranda.
4. The in banc panel prejudiced the appellant, was discriminary [sic] against a disabled individual and abused their discretion by failing to hold a hearing, requested by the appellant, to remedy service.
5. The in banc panel abused their discretion in ignoring historical precedents, Lewis v. Germantown Insurance Co[.], 251 Md. 535, 537, 248 A.2d 468 (1968) [sic] which establish that the intent of Jud. Trials [sic] and in banc reviews are a decision on the substantial merits.
6. The in banc panel was adversarial against the appellant, were prejudicial and abused their discretion in assuming that the appellant "demanded an alternate form of service" and "willfully disregarded the Court order[.]"
7. The in banc panel abused their discretion in their failure to uphold [Md. Code Ann., Health-Gen §§] 7-102(1)-(9)[] *to suppress the evil and advance the remedy*[.]
8. The in banc panel abused their discretion in ignoring the defendant's December 19, 2019 DEFAULT and ignor[ing] the undue hardship caused to the appellant over the past 7 years[.]

BACKGROUND

Ms. Shing is a participant in the Medicaid Community Pathways Waiver program administered by the Developmental Disabilities Administration ("DDA") of the Maryland Department of Health ("MDH").[2] In December of 2017, she filed a request for a hearing with the Office of Administrative Hearings ("OAH") regarding the denial of certain benefits she sought under the program. In July of 2019, an OAH administrative law judge ("ALJ") affirmed the DDA's decision to deny Ms. Shing the additional benefits sought.[3]

Ms. Shing filed a petition for judicial review in the Circuit Court for Howard County pursuant to Md. Code Ann., State Government § 10-222. In September of 2020, after a hearing, that court affirmed the decision of the ALJ. Ms. Shing filed a request for in banc review under Md. Rule 2-551 on October 1, 2020. That request was granted and an in banc panel was assigned.

Ms. Shing filed a "Memorandum of the Notice for In Banc Review" with supporting exhibits on October 28, 2020. On March 12, 2021, the DDA filed a motion to compel service, asserting that it "never received a copy of [the Memorandum of the Notice for In Banc Review], or associated documents, from [Ms. Shing]." Ms. Shing did not oppose that

[2] In an affidavit submitted to this Court, Ms. Shing asserts that she suffers from "cerebral palsy, static encephalopathy, Autism Spectrum 4, loss of use of [her] left hand, and connected medical issues[.]"

[3] The ALJ's decision indicates that at that time, Ms. Shing was then receiving "twenty hours of job coaching and 104 hours of Community Supported Living Arrangements" ("CSLA") per week. The additional benefits she sought included "forty-four additional hours of CSLA and ten hours of delegated nursing services[.]" CSLA is defined in Md. Code Ann., Health-Gen § 7-709(b).

motion. In an order entered April 9, 2021, the court granted the DDA's motion to compel, and ordered that Ms. Shing serve the DDA within 15 days.

On April 21, 2021, Ms. Shing filed a "Motion to Compel the [Defendant] to Provide a Good Faith Physical Receipt of the October 28th Memoranda with Exhibits due to the Extenuating Circumstan[c]es Caused by the Ongoing Pandemic." She asserted in that motion that she had "mailed all of the motions to the defendant by USPS[,]" and that "USPS has lost 3 of [her] certified letters and packages[.]" She attached three separate USPS tracking numbers to that motion, indicating packages that were "lost by USPS[,]" but she did not specify which, if any, contained the memorandum at issue.[4] She further asserted that her ability to use certain public resources had been terminated in March of 2020 as a result of the COVID-19 pandemic, and that she no longer had "access to a scanner that [could] scan the October 28th Memoranda with exhibits." And that she would call counsel for the DDA "to schedule a date and time to drop-off the memoranda with exhibits pursuant to the April 9th order[.]"

On May 13, 2021, the in banc panel, noting that Ms. Shing had "yet to comply" with the order compelling service, sua sponte dismissed the in banc proceeding "pursuant to the Court's authority under Md. Rule 2-551(g)(1) and in response to [Ms. Shing's]

[4] Receipts attached to two of the tracking numbers indicate that they were mailed on October 20, 2020 and November 19, 2020.

willful disregard for the orders of this Court[.]" The court denied Ms. Shing's motion to compel as moot that same day. Ms. Shing timely filed a notice of appeal.[5]

STANDARD OF REVIEW

It is well-established that this Court "review[s] questions of law *de novo*." *Manekin Constr., Inc. v. Maryland Dep't of Gen. Servs.*, 233 Md. App. 156, 172 (2017). "Because an interpretation of the Maryland Rules is appropriately classified as a question of law, we review the issue *de novo* to determine if the trial court was legally correct in its rulings on these matters." *Pickett v. Sears, Roebuck & Co.*, 365 Md. 67, 77 (2001). Sanctions imposed for rule violations are reviewed for an abuse of discretion.[6]

[5] This Court determined that the circuit court's September 29, 2020 judgment affirming the administrative law judge's decision is not reviewable on appeal because Ms. Shing had not withdrawn the notice for an in banc review before filing a timely notice of appeal from that judgment. *See* Md. Rule 8-202(d) ("A party who files a timely notice for in banc review pursuant to Rule 2-551 or 4-352 may file a notice of appeal provided that (1) the notice of appeal is filed within 30 days after entry of the judgment or order from which the appeal is taken and (2) the notice for in banc review has been withdrawn before the notice of appeal is filed and prior to any hearing before or decision by the in banc court."). But "[b]ecause the in banc panel did not reach the merits of Ms. Shing's petition, but instead dismissed the petition for her failure to serve her memorandum and a copy of the transcript, the in banc panel's May 13, 2021 order is reviewable on appeal in this Court."

[6] The DDA, citing *Watson v. Timberlake*, 251 Md. App. 420, 431, *cert. denied*, 476 Md. 281 (2021), posits that a circuit court's "sanction for failing to comply with an order and other such discretionary rulings are reviewed under an abuse of discretion standard." We do not disagree. The order in this case, however, dismissed the in banc review "for violating Maryland Rule 2-551(g) and willfully disobeying a court order to serve DDA[.]" The DDA appears to conflate service of the memorandum with its filing under Md. Rule 2-551(g)(1). Perhaps the circuit court did also but that is not clear in the order. In *Watson*, we considered whether the circuit court abused its discretion by permitting expert testimony after violation of a scheduling order in the course of discovery, which, as we discuss *infra*, is not applicable under the facts of this case. 251 Md. App. at 437. An abuse (continued…)

DISCUSSION

Ms. Shing asserts broadly that the court abused its discretion in dismissing the in banc proceeding. The DDA responds that the court correctly dismissed the in banc review pursuant to Md. Rule 2-551(g)(1) and Ms. Shing's failure to comply with the court's order compelling service of her in banc memorandum.

A court in banc "functions as a separate appellate tribunal, and not merely as an arm of the trial court[.]" *Bd. of License Comm'rs for Montgomery Cnty. v. Haberlin*, 320 Md. 399, 406 (1990) (quotation marks and citation omitted). A party's right to an in banc review is found in Article IV, Section 22 of the Maryland Constitution and is implemented in Md. Rule 2-551. *Berg v. Berg*, 228 Md. App. 266, 268 (2016) (footnote omitted) ("The Maryland Constitution, which was ratified in 1867, included a provision that granted most litigants in Maryland a right to an in banc appeal.").

Subsection (c) of Md. Rule 2-551 provides that "[w]ithin 30 days after the filing of the notice for in banc review the party seeking review shall file a memorandum stating concisely the questions presented, any facts necessary to decide them, and supporting argument." In addition, "[a] hearing shall be scheduled as soon as practicable but need not be held if all parties notify the clerk in writing at least 15 days before the scheduled hearing date that the hearing has been waived." Md. Rule 2-551(e).

of discretion occurs "when the court acts 'without reference to any guiding rules or principles[,]'" and, as we will later discuss, the cited authority in the court's order does not directly support the court's ruling. *Powell v. Breslin*, 430 Md. 52, 62 (2013) (quoting *North v. North*, 102 Md. App. 1, 14 (1994)).

Md. Rule 2-551(g), which addresses dismissal of in banc proceedings, provides that "[t]he panel, on its own initiative or on motion of any party, shall dismiss an in banc review if (A) in banc review is not permitted by the Maryland Constitution, (B) the notice for in banc review was prematurely filed or not timely filed except as provided in subsection (g)(2) of this Rule, or (C) the case has become moot." Md. Rule 2-551(g)(1). In addition, an in banc proceeding may be dismissed "if the memorandum of the party seeking review was not timely filed." *Id.*

Dismissal of a party's claim is "clearly the ultimate sanction[.]" *Weaver v. ZeniMax Media, Inc.*, 175 Md. App. 16, 46 (2007). And, "the Maryland Rules and caselaw contain a preference for a determination of claims on their merits; they do not favor imposition of the ultimate sanction absent clear support." *Holly Hall Publ'ns, Inc. v. Cnty. Banking & Tr. Co.*, 147 Md. App. 251, 267 (2002); *see also Hart v. Miller*, 65 Md. App. 620, 628 (1985) ("Dismissal runs counter to [a] valid societal preference for a decision on the merits."). To the extent that the court's dismissal of the in banc review was based on Md. Rule 2-551(g)(1), the record before us does not provide clear support for dismissal. There is no contention that the requested in banc review is not permitted by the Maryland Constitution; that the notice for the in banc review was improperly filed; or that the case had become moot. Md. Rule 2-551(g)(1).

Nor is the timely filing of Ms. Shing's memorandum disputed. Md. Rule 2-551(c). Linking service of her memorandum to its filing, as previously noted, the DDA argues that the court properly dismissed the in banc review under Md. Rule 2-551(g)(1) because "[w]hile the court docket reflects that [Ms. Shing's] memorandum had been filed, Ms.

Shing's failure to serve it, even after the DDA provided notice that it did not receive it, necessitates a finding that it had not been timely filed." Md. Rule 2-551(g)(1) provides no express support for that position, and we are not aware of any. The DDA also points to Md. Rules 1-321 and 1-323, but neither require dismissal of an action for failure of service under the rules.[7]

The DDA cites our decision in *Lovero v. Da Silva*, 200 Md. App. 433, 450 (2011) to bolster its argument that Ms. Shing violated Md. Rule 2-551(g)(1), arguing that it was "reasonable for the circuit court to have extended [the] non-filing rule to instances where it is undisputed that a party has not received service" but the other party does not effect service after being ordered to do so. In *Lovero*, we held that any pleading that "does not contain an admission or waiver of service or a signed certificate showing the date and manner of making service cannot become a part of any court proceeding[.]" 200 Md. App. at 446. But the DDA does not allege that the memorandum at issue did not include a certificate of service and, in fact, it did. *See A.A. v. Ab.D.*, 246 Md. App. 418, 440 (2020) (noting that "the clerk had no discretion but to accept" a pleading which met the literal requirements of Md. Rule 1-323); *see also Lovero*, 200 Md. App. at 443 (noting that the clerk "'should leave it to the court and the parties to determine the sanction for the defect

[7] Md. Rule 1-321(a) generally provides that "every pleading and other paper filed after the original pleading shall be served upon each of the parties[,]" and Md. Rule 1-323 prohibits the clerk from accepting a pleading for filing "unless it is accompanied by an admission or waiver of service or a signed certificate showing the date and manner of making service."

or deficiency'" (quoting Paul V. Niemeyer, Linda M. Schuett, John A. Lynch, Jr., & Richard W. Bourne, *Maryland Rules Commentary* 48-49 (3d ed. 2003))).[8]

Nor are we persuaded by the DDA's argument that the court order compelling service was "akin to a scheduling order[,]" and that dismissal was proper under *Manzano v. S. Maryland Hosp., Inc.*, 347 Md. 17, 29 (1997). *Manzano* involved a medical malpractice claim and the violation of a scheduling order in the context of discovery. *Id*. at 28. There, the Supreme Court of Maryland[9] stated that the imposition of sanctions for violation of scheduling orders was "appropriate" but because the dismissal of a claim, was "among the gravest of sanctions," it held that dismissal was inappropriate in that case. *Id.* at 29.

We have stated that "litigation proceeds by stages and . . . the different stages are governed by different rules and standards" and that the discovery stage of litigation "clearly has its own unique rules." *Klupt v. Krongard*, 126 Md. App. 179, 197 (1999). It is well-established that the court has broad authority to apply sanctions for discovery violations.

[8] The certificate of service indicates that it was sent to David Lapp at 300 W. Preston Street, Room 302, in Baltimore, Maryland 21202. It appears that Mr. Lapp was an assistant attorney general representing the Department of Health at that time. The assistant attorney general designated by the Attorney General for service in the order of September 28, 2020 was Margaret Lankford, assistant attorney general at the same address. *See* Md. Rule 2-124(k).

[9] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See, also*, Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland….").

See Tydings v. Allied Painting & Decorating Co., 13 Md. App. 433, 436 (1971) ("A large measure of discretion is entrusted to trial judges in Maryland in applying sanctions for failure to comply with the rules relating to discovery."). Indeed, the rule governing sanctions in the course of discovery expressly provides for "dismissing the action or any part thereof" if the court "finds a failure of discovery[.]" Md. Rule 2-433(a)(3). On the other hand, "the drastic sanction of dismissal for failure to comply with discovery should only be invoked where the plaintiff shows a deliberate and contumacious disregard of the court's authority." *Berrain v. Katzen*, 331 Md. 693, 708 (1993) (quotation marks and citation omitted). In short, we are not persuaded that Rule 2-551(g)(1) supports the May 11, 2021 order. We explain.

"In construing a Maryland Rule, we apply the same rules of interpretation as we do in construing statutes." *Nationwide Mut. Ins. Co. v. Regency Furniture, Inc.*, 183 Md. App. 710, 738 (2009). Although the DDA asks us to hold that dismissal was proper under Md. Rule 2-551(g)(1) based on Ms. Shing's failure to properly serve the DDA, we decline to read language into the rule which does not plainly appear. *Smack v. Dep't of Health and Mental Hygiene*, 378 Md. 298, 305 (2003) ("Words may not be added to, or removed from, an unambiguous statute in order to give it a meaning not reflected by the words the Legislature chose to use[.]"). Rule 2-551(g)(1) expressly provides the four circumstances when dismissal of an in banc review may be proper, none of which expressly apply to the facts before us. For that reason, any imposition of sanctions in this case must rest on the inherent power of the court to regulate and manage the litigation in accordance with the rules and the court's finding of a "willful disregard" for its orders.

But we are not persuaded that the record in this case clearly supports a finding of a "willful disregard" for these orders. The DDA cites *Manzano* as support for dismissal. The *Manzano* Court, however, stated that dismissal is proper "only in cases of egregious misconduct such as 'wil[l]ful or contemptuous' behavior, 'a deliberate attempt to hinder or prevent effective presentation of defenses or counterclaims,' or 'stalling in revealing one's own weak claim or defense.'" 347 Md. at 29 (citation omitted). *See Williams v. Williams*, 32 Md. App. 685, 695 (1976) (noting that in "every case where the ultimate sanction has been imposed, such action has been taken in the presence of contumacious or dilatory conduct on the part of the plaintiff or when the noncomplying party had disobeyed a direct order of the court to depose, or to show cause, to answer interrogatories, or to respond to his opponent's motion for dismissal or default judgment").

Because the "imposition of the ultimate sanction absent clear support" is not favored, we shall vacate the order dismissing the in banc review and remand for further proceedings consistent with this opinion. *Holly Hall Publ'ns*, 147 Md. App. at 267.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR HOWARD COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE SPLIT EVENLY BETWEEN THE PARTIES.