

Circuit Court for Montgomery County
Case No. 150504FL

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 737

September Term, 2020

ANTHONY FOSTER

v.

JEWEL LEE BLACKMON

Graeff,
Berger,
Ripken,

JJ.

Opinion by Berger, J.

Filed: April 20, 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 case is before us on appeal from an order of the Circuit Court for Montgomery County denying a Notice for In Banc Review filed by Anthony Foster (“Husband”), appellant, in a divorce proceeding involving his ex-wife, Jewel Lee Blackmon (“Wife”). Husband presents two issues for our consideration on appeal, which we have consolidated and rephrased as a single issue as follows:

Whether the circuit court erred and/or acted without authority when denying Husband’s Notice for In Banc Review.

For the reasons explained herein, we shall vacate the circuit court’s order denying Husband’s Notice for In Banc Review and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts relevant to the parties’ divorce are largely unrelated to the issues before us on appeal. We shall set forth those facts necessary for our consideration of this appeal as well as limited additional facts in order to provide context. Husband and Wife met in 1968 and married on May 25, 1995 in Sacramento, California. They have resided in Maryland since 2001. They are the parents of two children, one of whom is a minor. The parties separated on December 4, 2017.

On January 12, 2018, Husband filed for divorce in the Circuit Court for Montgomery County. A merits hearing was held on June 24 and 25, 2019. The circuit court issued a Judgment of Absolute Divorce on February 26, 2020. The trial court issued a separate custody order on March 3, 2020. Husband filed four separate *pro se* motions asking the trial court to reconsider its Judgment of Absolute Divorce and custody order. Specifically, on March 6, 2020, Husband filed a motion for reconsideration of the

February 23, 2020 Judgment of Divorce; on March 12, 2020, Husband filed a motion for reconsideration of the trial court’s custody order; on March 17, 2020, Husband filed an amended motion for reconsideration of the Judgment of Absolute Divorce; and, on March 17, 2020, Husband filed a motion asking the trial court to stay the Judgment of Absolute Divorce “on the following Orders; (1) Alimony Husband to pay Wife \$3,000 per month and (2) Automobile 2001 Volvo C-70 to be Wife’s Sole-property.” Husband utilized the form motion provided for the Maryland Judiciary¹ for each of the four motions he filed. In all four motions, Husband filled in the blank line for “grounds and authorities” by identifying Maryland Rules “2-533, 2-534, and 2-535.” In an order dated June 19, 2020 and docketed on June 29, 2020, the circuit court denied Husband’s *pro se* motions.²

Nine days later, Husband filed a Notice for In Banc Review. On August 28, 2020, the circuit court issued an order denying Husband’s Notice for In Banc Review.³ In the circuit court’s order, the court observed that, pursuant to Maryland Rule 2-551(a), “issues

¹ The form motion Husband used is available for download from the Maryland Judiciary website at <https://www.courts.state.md.us/sites/default/files/court-forms/courtforms/joint/cc022.pdf/cc022.pdf>.

² During the time between the filing of Husband’s *pro se* motions and the issuance of the order denying them, court operations in Maryland were significantly limited during the early months of the COVID-19 emergency.

³ The circuit court’s August 28, 2020 order also granted Wife’s Motion to Dismiss [Husband’s] Notice of Appeal. Husband asserts that he had filed a Notice of Appeal, but the notice was never docketed. Wife, however, filed a Motion to Dismiss Plaintiff’s Notice of Appeal on July 15, 2020, so it appears that Wife was served with Husband’s Notice of Appeal or otherwise made aware of it, despite the fact that it does not appear in the circuit court’s docket entries. Husband’s Notice of Appeal and Wife’s motion to strike the same is not at issue in this appeal.

are preserved for *In Banc* Review by making an objection in the manner set forth in Md. Rule 2-517 (related to objection at trial).” The circuit court found that “[a]t the divorce merits trial, [Husband] did not object to any of [Wife’s] evidence” and “made no attempt to object to or strike on any ground for any reason. As such, [Husband] failed to preserve any issues for *In Banc* Review in that proceeding.” The circuit court further found that Husband also “made no objection to the admission of any of the evidence [Wife] provided at the custody modification trial.” Finally, the circuit court found that Husband “did not note the request for an *In Banc* Review within ten (10) days as required (nor any time thereafter with new counsel, until July 8, 2020, 127 days later).” On September 22, 2020, Husband filed a Notice of Appeal of the circuit court’s denial of his Notice for In Banc Review.

STANDARD OF REVIEW

The issue before us in this case is the appropriate interpretation of Maryland Rule 2-551. Although we “will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses,” Md. Rule 8-131(c), we do not grant the same deference to the trial court’s interpretation of the Maryland Rules. *Davis v. Slater*, 383 Md. 599, 604 (2004). “Because our interpretation of the Maryland Declaration of Rights and Constitution, provisions of the Maryland Code, and the Maryland Rules are appropriately classified as questions of law, we review the issues *de novo* to determine if the trial court was legally correct in its rulings on these matters.” *Id.*

DISCUSSION

The narrow issue before us on appeal is whether the circuit court erred by denying Husband’s Notice for In Banc Review. As we shall explain, we hold that the circuit court erred by issuing an order denying Husband’s Notice for In Banc Review.

Pursuant to Maryland Rule 2-551, “a party against whom a decision was made by the circuit court [has] a right to in banc review by a three-judge panel of the circuit.” *Hartford Fire Ins. Co. v. Estate of Sanders*, 232 Md. App. 24, 36 (2017). “The in banc court functions ‘as a separate appellate tribunal[.]’” *Id.* at 37 (quoting *Bienkowski v. Brooks*, 386 Md. 516, 553 (2005)). The in banc court does not reconsider the decision of the trial court, but rather “engage[s] in appellate review of the trial court’s decision.” *Id.* (citations omitted). Pursuant to Maryland Rule 2-551(h), a party who seeks and obtains in banc review has no further right of appeal, however, “[t]he decision of the panel does not preclude an appeal to the Court of Special Appeals by an opposing party who is otherwise entitled to appeal.”

Maryland Rule 2-551(b) provides that “the notice for in banc review shall be filed within ten days after entry of judgment.” The rule further provides that “[w]hen a timely motion is filed pursuant to Rule 2-532, 2-533, or 2-534, the notice for in banc review shall be filed within ten days after (1) entry of an order denying a motion pursuant to Rule 2-533 or disposing of a motion pursuant to Rule 2-532 or 2-534 or (2) withdrawal of the motion.” Husband asserts that because his Notice for In Banc Review was filed within ten days of

the circuit court’s order denying his *pro se* motions for reconsideration, it was timely filed and the circuit court erred in concluding otherwise. We agree with Husband.

Husband filed his *pro se* motion for reconsideration of the circuit court’s Judgment of Absolute Divorce on March 6, 2020, less than ten days after the Judgment of Absolute Divorce was entered on February 26, 2020. Although not specifically styled as a Rule 2-534 Motion to Alter or Amend, it should have been treated as such by the circuit court. *White v. Prince George’s Cty.*, 163 Md. App. 129, 140 (2005) (“[A] motion to revise a court’s judgment, however labeled, filed within ten days after the entry of judgment will be treated as a Rule 2-534 motion.”) (internal quotation omitted). Similarly, Husband’s *pro se* motion for reconsideration of the trial court’s custody order was filed on March 12, 2020, within ten days of the circuit court’s March 3, 2020 custody order. This motion should also have been treated as a Rule 2-534 motion. *See id.* Furthermore, as we discussed *supra*, both of the *pro se* motions specifically referenced Rule 2-534.

Because Husband’s Notice for In Banc Review was filed within ten days of the entry of the circuit court’s order denying his Rule 2-534 motion, the Notice for In Banc Review was timely filed pursuant to Maryland Rule 2-551(b). Accordingly, the circuit court erred in determining that the Notice for In Banc Review was untimely filed.

Furthermore, the circuit court concluded in its order denying Husband’s Notice for In Banc Review that Husband “did not object to any of [Wife’s] evidence” and “made no attempt to object or strike on any ground for any reason.” As Husband points out in his brief, the record reflects that Husband did object to the introduction of evidence during

both the custody trial and the divorce merits trial in a few limited instances. In this appeal, we need not and shall not assess which issues, if any, were properly reserved for in banc review. *See* Md. Rule 2-551(a) (“Issues are reserved for in banc review by making an objection in the manner set forth in Rules 2-517 and 2-520.”). The assessment of which issues were properly reserved for in banc review is for the in banc panel -- not this panel of the Court of Special Appeals -- to undertake.⁴ Furthermore, we emphasize that we take no position whatsoever with respect to the substantive issues raised by Husband in connection with the Notice for In Banc Review.

⁴ Wife asserts that, assuming *arguendo* that Husband’s objection was properly made, any objection was waived because Husband did not subsequently move to strike the evidence. Wife asserts that Maryland Rule 2-517(a) provides that an “objection is waived unless, at some time before final argument in a jury trial or before the entry of judgment in a court trial, the objecting party moves to strike the evidence” Rule 2-517(a) provides, in its entirety:

An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived. The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs. The court shall rule upon the objection promptly. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court may admit the evidence subject to the introduction of additional evidence sufficient to support a finding of the fulfillment of the condition. The objection is waived unless, at some time before final argument in a jury trial or before the entry of judgment in a court trial, the objecting party moves to strike the evidence on the ground that the condition was not fulfilled.

When considering the entire subsection of the above-quoted rule, it is clear that the language quoted by Wife applies only to evidence that was conditionally admitted.

Pursuant to Md. Rule 2-551(a), “[u]pon the filing of the notice, the Circuit Administrative Judge shall designate three judges of the circuit, other than the judge who tried the action, to sit in banc.” The in banc 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 . . ., or (C) the case has become moot.” Md Rule 2-551(g). The rule further provides that “[t]he panel may dismiss if the memorandum of the party seeking review was not timely filed.” *Id.* Upon the filing of Husband’s Notice for In Banc Review, the administrative judge of the Circuit Court for Montgomery County should have designated three judges to sit in banc and consider Husband’s in banc appeal. Instead of convening an in banc panel, the circuit court denied Husband’s Notice for In Banc Review. This was in contravention of Rule 2-551 and constitutes reversible error. We, therefore, shall vacate the circuit court’s order denying Husband’s Notice for In Banc Review and remand for further proceedings consistent with this opinion.

**ORDER OF THE CIRCUIT COURT FOR
MONTGOMERY COUNTY DENYING
APPELLANT ANTHONY FOSTER’S
NOTICE FOR IN BANC REVIEW
VACATED. CASE REMANDED TO THE
CIRCUIT COURT FOR FURTHER
PROCEEDINGS CONSISTENT WITH
THIS OPINION. COSTS TO BE PAID BY
APPELLEE.**