UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1452

September Term, 2014

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COUNTY COMMISSIONERS OF
CAROLINE COUNTY

v.

DENNIS DALE TRICE

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Berger,
Nazarian,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

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Opinion by Nazarian, J.

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Filed: November 20, 2015

Larry and Barbara Nichols ("Nichols Sr.") obtained a permit to subdivide their landlocked eighty-eight-acre property in Caroline County by representing to the county's Zoning Administrator that a thirty-foot right-of-way connected the property to a public road. In fact, no such right-of-way existed. Nichols Sr. then conveyed one of the subdivided plots to their son and daughter-in-law, Larry A. Nichols, Jr. and Lynn Nichols ("Nichols Jr."), who obtained an occupancy permit and constructed a house that depended for road access on that non-existent right-of-way. Their neighbors, Dennis and Lynn Trice ("The Trices"), over whose property the fictional right-of-way crossed, brought suit in the Circuit Court for Caroline County when Nichols Jr. began construction in 2007.

Ever since, the Trices and both sets of Nicholses have been embroiled in litigation; the full story, which we recount below, is complicated, perhaps needlessly so. This appeal arises from the Trices' most recent effort to bring the Caroline County Board of Commissioners and the Zoning Administrator (collectively, "the County") into the litigation so that, they hope, the court will compel the County to enforce County zoning laws against the Nicholses. The County appeals the circuit court's August 15, 2014 order denying its motion to be dismissed from the Trices' most recent petition. We agree with the Trices that the order denying the County's motion to dismiss is a non-appealable interlocutory order, and we dismiss the appeal.

## I. BACKGROUND

The Trices operate a family farm on two parcels of land that they acquired in 1973. The first parcel is bordered to the west by State Route 16 ("the west parcel"). The second,

lying to the east, is a landlocked parcel that does not border any public road ("the east parcel"), and sandwiched between it and the west parcel lies a separate, third parcel of eight-eight and three-quarter-acres ("the eighty-eight-acre property"). The eighty-eight-acre property also does not have access to a public road; a twelve-foot gravel driveway running from Route 16 serves as ingress and egress to both the eighty-eight-acre property and the east parcel. Prior to 2004, the Trices leased the eighty-eight-acre property from a third party to farm along with their own land, and they used the gravel driveway to move farming vehicles and equipment across the eighty-eight-acre property and to the east parcel. In 2004, however, Nichols Sr. bought the property and erected a fence that blocked the Trices from moving their equipment across it and onto the east parcel. The old adage about good fences making good neighbors turned out to be wrong in this particular situation.

The deed to the eighty-eight-acre property entitled it to only one development right, which the Nichols Sr.'s house exhausted. To solve this problem, Nichols Sr. sought to subdivide the eighty-eight-acre property into two lots, one of which would be a four-acre lot that Nichols Sr. would (and ultimately did) convey to Nichols, Jr. But Caroline County regulations allow for subdivisions only if the new lot will either "have frontage on an existing [public road]" or "front on a private road where a right-of-way *at least 30 feet wide*" extends to a public road. CAROLINE CTY., MD. SUBDIVISION REGS. § 162-15A (emphasis added). This posed a new problem for the Nicholses, because the subdivision did not connect to a public road and lacked a thirty-foot right-of-way connecting it to one. Undaunted, Nichols Sr. employed Clarence H. Miller, a local surveyor, to produce a plat

(the "Miller Plat") of the four-acre plot that depicted a thirty-foot right-of-way from the lot to Route 16, and omitted the twelve-foot right of way that actually existed. The County approved the subdivision and issued a permit to construct a house based on this misrepresentation. Construction began (and eventually was completed) on a second residence the Nichols Jr. family occupied.

**A. The 2007 Motion to Dismiss**

When the Trices learned how the Nicholses had obtained their subdivision and building permit in March 2007, they filed a complaint to quiet title and for declaratory and injunctive relief against Nichols Sr. and other neighboring property owners in the circuit court. They also named the County as an interested party defendant, citing the County's decision to grant Nichols Sr.'s subdivision application based on the non-existent thirty-foot right-of-way. On March 29, 2007 the County filed a motion to dismiss the claims against it, arguing that the Trices stated no cause of action because "no valid permit or authorization can issue to a party who lacks the property interest requisite to obtain such permit or authorization." In other words, the County viewed this as a purely private property dispute, and argued that it did "not need to be a party for [the circuit court] to declare any such permit or authorization void *ab initio*" (emphasis in original) if the Nicholses' subdivision application misstated their property rights.

The circuit court granted the County's motion to dismiss without prejudice, and the Trices filed an amended complaint removing the County as a defendant in March 2008. In part, the amended complaint sought an injunction that would prevent Nichols Sr. from

misrepresenting the width of the gravel drive in the County's land records, a declaration that the Miller Plat recorded in the land records was without lawful basis, and an order requiring Nichols Sr. to withdraw the plat from the land records. Trial proceeded in May 2008 without the County.

In an amended declaratory judgment ("the easement decision"),[1] filed July 23, 2009, the circuit court found that the thirty-foot right-of-way shown on the Miller Plat was created solely for the purpose of satisfying the County's subdivision requirements, "has never had any basis in law or fact and therefore is without significance of any kind." Further, the court found that the gravel roadway connecting the east parcel and the Nicholses' property to Route 16 served as a prescriptive easement for the purpose of ingress and egress; that the Nicholses could reasonably use this easement to access their property; and that the easement was no greater than twelve feet wide. However, the court declined to issue an injunction to order the Nicholses to strike the subdivision from the County's land records, expressing confidence that no "party will act in a manner contrary to the findings and declarations in this Judgment." As we will see, the court's confidence was, unfortunately, misplaced.

[1] The amended final judgment modifies some language from the original final judgment to address the issue of farm equipment moved along the twelve-foot prescriptive easement; the distinction is irrelevant to the appeal at hand.

### B. The 2011 Motion to Dismiss

In May 2010, the County informed Nichols Jr. by letter that occupancy of their home was illegal, and that no occupancy permit could be issued because the subdivision plans on file with the County contained a material misrepresentation of fact. Further, the County requested that Nichols Jr. pursue a "lot line revision"[2] in order to cure the defects or face civil citation from the County. The County eventually issued a civil citation and ordered Nichols Jr. to vacate in December 2010, but helped Nichols Jr. file a proposed lot line revision the following month.

In November 2010, the Trices filed in the circuit court a Petition to Implement and Enforce the 2009 easement decision, once again adding the County as a defendant. They amended the petition on January 21, 2011. The petition sought a supplemental declaration that the 4-acre subdivision was void, and that the Nichols Jr. residence could not be made lawful by means of the proposed "lot line revision." In addition, the Trices asked the court to issue a writ of mandamus directing the County to declare the Miller Plat and the building permit issued for the second residence void *ab initio*.

The County moved to dismiss the Amended Petition to Implement and Enforce in January 2011, arguing that the petition was "procedurally defective, barred by *res judicata*, and fail[ed] to state a claim upon which relief [could] be granted." Meanwhile, and before

[2] A detailed description of the "lot line revision" solution is unnecessary for our analysis, but suffice it to say that it was proposed by the County as an administrative solution meant to legalize Nichols Jr.'s subdivision.

the court decided the motion, the Nicholses filed a revised "lot line revision" plat that the Zoning Board approved in May 2011. The Trices promptly appealed Zoning Board's approval to the Caroline County Board of Appeals.

In addition, in response to the Zoning Board's decision, the Trices filed in the circuit court in June 2011 a motion to stay the proceedings surrounding their Amended Petition to Enforce the 2009 easement decision. Instead of a stay, though, the circuit court granted the County's motion to dismiss the petition to enforce, concluding that it was "without the authority to move forward in [the] case until all administrative remedies are exhausted and the [lot line revision] matter comes before it by way of judicial review . . . ." The court also found that in light of the County's efforts to rectify the illegal subdivision, there were no grounds for a mandamus action.

### C. The 2014 Motion to Dismiss

The County Board of Appeals affirmed the Zoning Board's decision to approve the lot line revision, and the Trices requested judicial review in the circuit court. But in January 2014, the court reversed and vacated the Board of Appeals's decision, ruling that a lot line plat could not cure the illegality or legitimize the Nicholses' subdivision. The County filed a Declaration of Revocation and Withdrawal of Approval of Subdivision Plats in the County land records, but took no other substantive action.

The Trices remained unsatisfied, though, so in July 2014, they filed a Second Amended Petition to Enforce the 2009 easement decision. The Second Petition again added the County and, for the first time, the Zoning Administrator as defendants. The

Trices asked the court to order the Zoning Administrator to have the Nichols Jr.'s house razed and removed, to prevent the home from being occupied, to amend the deed to reflect that the building permit for the Nichols Jr. home construction was unlawful, to issue civil citations to the Nicholses for ongoing zoning violations, and to institute criminal proceedings against Nichols Sr. and Nichols Jr.

As before, the County and the Zoning Administrator moved to dismiss the Second Amended Petition. They argued that the circuit court "ha[d] no basis in law or in fact for exercising any jurisdiction relative to the County or the Zoning Administrator." The County contended that the Zoning Administrator had never been a party to the underlying proceedings, and that the circuit court had previously granted judgment in favor of the County when the court granted its original motion to dismiss in May 2007. As such, it argued, "further relief" was not available to the Trices, at least from the County, via Md. Code (1974, 2013 Repl. Vol.), § 3-412 of the Courts and Judicial Proceedings Article ("CJP"), and that the time for the court to revise the earlier judgment under Md. Rule 2-535 had long since passed. In an order filed August 15, 2014, the circuit court denied the County's motion to dismiss without a hearing. The County filed a timely notice of appeal on September 11, 2014.[3]

[3] The Trices filed a motion to strike the appeal arguing that the circuit court's August 15 order denying the County's motion to dismiss was not appealable. After a hearing in December 2014, the court determined it had no authority to strike the appeal.

## II. DISCUSSION

The County seeks to raise two separate questions on appeal.[4] The *first*, threshold issue is whether the circuit court's order denying the County's motion to dismiss is immediately appealable, and thus whether we have jurisdiction to hear it. *Second*, the County asks us to determine whether it was proper for the circuit court to deny the County's motion to dismiss, or, to get to the root of the claim, whether the Trices properly named the County as an interested party defendant under CJP § 3-412 in the Second Amended Petition. The existence (or not) of jurisdiction to review the circuit court's order is a

[4] The County phrased the Questions Presented in its brief as follows:

> 1. Do Appellants have an immediate right to appeal the Circuit Court's denial of their motion to dismiss where there already is a final, non-appealed, enrolled judgment in their favor in the case?
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> 2. Did the Circuit Court err when it made Appellants party to a case to revise a final judgment enrolled in their favor without any showing of fraud, mistake or irregularity?
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> 3. Did the Circuit Court err when it allowed a petition for further relief under § 3-412 of the Courts and Judicial Proceedings Article to proceed against Appellants, who were not parties to the underlying declaratory judgment case and never had a declaratory judgment entered against them?
>
> 4. Do Appellants have a right to an interlocutory appeal?

question of law. *Baltimore Housing Alliance, LLC v. Geesing*, 218 Md. App. 375, 381 (2014).

The County argues that the circuit court's order denying its motion to dismiss is immediately appealable *first*, under the collateral order doctrine, and *second*, because the County has a final judgment in its favor—the 2007 order granting the County's motion to dismiss without prejudice—that cannot be revised under Md. Rule 2-535 without a showing of fraud, mistake, or irregularity.[5] We disagree, and hold that the circuit court's order denying the County's motion to dismiss is a non-appealable interlocutory order. This obviates any need to address the second argument.

### A. The County Has No Immediate Right To Appeal Under the Collateral Order Doctrine.

An order of the circuit court must be appealable in order to confer jurisdiction on an appellate court. *Lewis v. Lewis*, 290 Md. 175, 199 (1981). To be appealable, an order must be final. *Jackson v. State*, 358 Md. 259, 266 (2000) (citations omitted); *see also* CJP § 12-101(f) (defining a "final judgment" as one "from which an appeal, application for leave to appeal, or petition for certiorari may be taken"). A final judgment is one that

[5] The county phrases this argument as follows:

> The Court of Appeals has held that were [sic] a party has a final judgment in its favor in a case, that party has a right to an immediate appeal of a denial of a motion to dismiss where the adverse party that tried to re-open the case had no meritorious cause of action and failed to prove the elements necessary to vacate the judgment in favor of the moving party.

"concludes the rights of parties," or that "denies the parties means of further prosecuting or defending their rights . . . ." *Highfield Water Co. v. Wash. Cty. Sanitary Dist.*, 295 Md. 410, 415 (1983). The purpose of the rule is to prevent piecemeal appeals, and to ensure that appeals are permitted only when the trial court has fully adjudicated all the issues in a case. *Kurstin v. Bromberg Rosenthal, LLP*, 191 Md. App. 124, 133 (2010); *see also Wash. Suburban Sanitary Comm'n v. Lafarge N. Am., Inc.*, 443 Md. 265, 274 (2015) ("[A]n appellate court may consider, on its initiative, jurisdictional questions that it notices.").

The County concedes that the order at issue is not a final judgment in itself, but argues that it is nonetheless appealable under the collateral order doctrine. The collateral order doctrine is an exception to the final judgment rule[6] that allows a non-final judgment to be appealed immediately if the order has four characteristics: *first*, the order conclusively determines the disputed question; *second*, it resolves an important issue; *third*, it is completely separate from the merits of the action; and *fourth*, the decision is effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *Town of Chesapeake Beach v. Pessosa*, 330 Md. 744, 755 (1993); *Kurstin*, 191 Md. App. at 148. The judgment must satisfy all four elements to fall within the

[6] Actually, there are three exceptions to the final judgment rule: Appeals from interlocutory orders allowed by statute, immediate appeals permitted under Md. Rule 2-602, and interlocutory rulings allowed under the collateral order doctrine. *Kurstin*, 191 Md. App. at 134 (quoting *Salvagno v. Frew*, 388 Md. 605, 615 (2005)). But because the County does not argue that the circuit court's denial of its motion to dismiss fits under the first or second exceptions to the final judgment rule, we address only the collateral order doctrine.

collateral order exception. *Kurstin*, 191 Md. App. at 144-45 (quoting *In re Franklin P.*, 366 Md. 306, 327 (2001)). The exception is extremely limited, and "should be applied sparingly in only the most extraordinary circumstances." *Schuele v. Case Handyman*, 412 Md. 555, 572 (2010). And in this case, the collateral order doctrine does not apply because the Trices' ability, or lack thereof, to obtain relief from the County will be reviewable on appeal from the final judgment on the merits.

The first inquiry is whether the circuit court's order constitutes a "conclusive determination of the disputed question." *Kurstin*, 191 Md. App. at 148. It doesn't. The disputed question in this case, as the County articulated it in its motion to dismiss, is whether the Trices can properly seek "further relief" from the County or the Zoning Administrator via CJP § 3-412, given that neither was a party to the 2009 easement decision. *See* CJP § 3-412(c) (allowing applications for further relief based on a declaratory judgment, and requiring only those parties whose rights have been adjudicated in the underlying litigation to show cause why further relief should not be granted). But the order denying the County's motion to dismiss didn't address the availability of § 3-412 as a vehicle to request further relief—the court declined to decide the question on the merits in favor of the County on a motion to dismiss posture. The County may ultimately be right about the reach of § 3-412, but just as we express no views on that question, neither did the circuit court. For that reason alone, the order before us can't qualify as a collateral order.

This order fails the other three elements of the collateral order analysis as well. The circuit court's order does not "resolv[e] an important issue" because "the denial of a

challenge to the jurisdiction does not settle or conclude the rights of any party or deny him the means of proceeding further. It settles nothing finally." *Gruber v. Gruber*, 369 Md. 540, 547-48 (2002) (quoting *Eisel v. Howell*, 220 Md. 584, 586 (1959)). The decision is not "completely separate from the merits of the action." *Kurstin*, 191 Md. App. at 149. If anything, the availability of "further relief" from non-parties, and specifically the County, *is* the merits issue here. And for the same reason, the circuit court's ultimate decision on the scope of CJP § 3-412 will not be "effectively unreviewable on appeal from a final judgment"— it will be fully reviewable after the court decides it. We recognize the relative novelty of the Trices' procedural approach here, and we wonder, as the County has, why they proceeded in this fashion rather than, for example, filing a new suit against the County seeking a writ of mandamus. But those are questions for the circuit court to analyze and decide in the first instance, and its decision not to dismiss the County up front is not appealable immediately as a collateral order.

### B. The County's Theory That The 2014 Order Is Immediately Appealable Because It Revises the 2007 Order is Without Merit.

The County also argues that it has a right to an immediate appeal because the 2007 Order dismissing it from the case serves as a final judgment that can be revised only upon a showing of fraud, mistake, or irregularity under Md. Rule 2-535. Rule 2-535 generally prohibits a court from modifying a judgment more than thirty days after its entry, absent a showing of fraud, mistake, irregularity, newly discovered evidence, or clerical mistake. The County contends that by denying its 2014 motion to dismiss, the circuit court is

reopening the case, setting aside a final judgment, and "undermin[ing] the rule of law." We disagree that that is what the circuit court did here.

The County argues that two cases, *Williams v. Snyder*, 221 Md. 262 (1959), and *Schwartz v. Merchants Mortgage Co.*, 272 Md. 305 (1974), support its right to an immediate appeal, but those cases involved very different interlocutory orders. In *Williams*, the Court of Appeals held that a defendant had an immediate right of appeal from an order by the circuit court that re-opened a default judgment previously entered in favor of the defendant. 221 Md. at 268. The court reasoned that "when the judgment became enrolled the defendant acquired a substantial right in the judgment . . . of which he cannot be validly deprived except upon a showing of fraud, mistake or irregularity." *Id.* And in *Schwartz*, the Court of Appeals refused to vacate a final judgment in favor of defendants where the plaintiffs alleged that defendants had perjured their testimony and manufactured false documents for trial, favoring finality absent a showing of extrinsic fraud that would compromise the adversarial nature of the trial. *See* 272 Md. at 309-10 ("the charge that . . . the decree was founded on perjured testimony, likewise goes to the merits of the case, and . . . is not recognized as a sound reason for setting aside a decree after it has been enrolled . . ." (quoting *Tabeling v. Tabeling*, 157 Md. 429, 434 (1929))).

The County points out that both cases stand for the proposition that a court has limited authority to revise a final judgment. True enough. But the Trices have not asked the circuit court to *revise* the 2007 Order dismissing the County (without prejudice, by the way). Rather than modifying or amending the 2007 dismissal Order, the 2014 order is a

new interlocutory order entered on a completely different procedural posture. The Trices have not asked the court to change anything about the 2007 dismissal Order—instead, they have asked the court to enter "further relief" arising from a later decision to which the County and Zoning Administrator were not parties. That points us back to the scope of CJP § 3-412, whatever that might be, not to Md. Rule 2-535.

*Finally*, and for what it's worth, we disagree with the County's assertion that the 2007 Order granting dismissal without prejudice was a final judgment. It wasn't, because it "adjudicated the rights and liabilities of fewer than all parties to the action." Md. Rule 2-602(a); *see also Tharp v. Disabled American Veterans Dept. of Md., Inc.*, 121 Md. App. 548, 549 (1998) (finding that an order granting dismissal of a complaint against three of eight total defendants was "presumptively not a final judgment within the contemplation of Rule 2-602(a) . . ." and therefore non-appealable).

**APPEAL DISMISSED. COSTS TO BE PAID BY APPELLANT.**