Circuit Court for Prince George's County
Case No. CAD-16-41121

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2307

September Term, 2018

MARCUS REESE-SHAW

v.

KARINE N. SHAW

Kehoe,
Arthur,
Beachley,

JJ.

Opinion by Beachley, J.

Filed: February 14, 2020

Although appellant Marcus Reese-Shaw ("Husband") and appellee Karine N. Shaw ("Wife") were able to amicably resolve all of the substantive issues arising from the dissolution of their marriage, they are unable to agree about the propriety of a December 13, 2017 Order issued by the Circuit Court for Prince George's County that awarded Husband's counsel $6,000 in attorney's fees and expenses. After an *in banc* panel in the circuit court reversed the December 13, 2017 Order and vacated the $6,000 award, Husband noted this timely appeal, in which he presents the following questions:

1. Did the in banc panel have jurisdiction over an in banc review where ex-wife filed her in banc notice after the deadline imposed by Maryland Rule 2-551?

2. Did the in banc panel apply the wrong standard of review to the order denying reconsideration?

3. Did the trial judge abuse his discretion by denying the motion for reconsideration?

Because we conclude that Wife did not timely file her Notice for In Banc Review, we shall reverse and vacate the *in banc* court's decision.

FACTUAL AND PROCEDURAL BACKGROUND

The parties, who were married on November 18, 2011, began having marital problems in 2016. On November 7, 2016, Husband filed a Complaint for Limited Divorce. On December 27, 2016, Wife filed an Answer to Husband's Complaint for Limited Divorce as well as her own Counter Complaint in which she sought a limited or, alternatively, an absolute divorce.

We shall dispense with reciting the full procedural history of the circuit court proceedings because of its irrelevance to the issue before us. Suffice it to state that the case

was called for trial on November 2, 2017. After ruling on motions *in limine*, the court heard opening statements by the parties' counsel. After opening statements, the court recessed to meet with counsel in chambers, presumably to explore the possibility of settlement. Several hours later, the parties, with counsel, placed a settlement agreement on the record. The court then received testimony to support granting the parties an absolute divorce. At the end of the hearing, the parties agreed that Wife's counsel would prepare the proposed judgment of absolute divorce. Wife's counsel agreed to submit the approved judgment of absolute divorce to the court by November 14, 2017.

At this point, the case appeared to be resolved. As we shall see, however, things quickly went awry. The parties were unable to effectuate a written settlement agreement and proposed judgment of absolute divorce by November 14, the deadline established by the court. Although the court sent no notice for a hearing, it nevertheless held a hearing on November 14 where only Husband's counsel appeared. At that hearing, Husband's counsel advised the court that the parties had not yet executed settlement documents. The court instructed Husband's counsel to obtain a transcript of the November 2 hearing during which the settlement terms were placed on the record. The court then scheduled a hearing for November 27, but did not specify a precise time for the hearing.[1] That hearing, essentially a status hearing, was set to determine whether the parties were successful in their efforts to execute the necessary settlement documents. No written notice of the

[1] The court stated, "I want you here at 9:00 but we probably may not get to you before 10:00, something like that."

November 27 hearing was sent to either Husband's or Wife's counsel.

Presumably because she never received notice of the November 27 hearing, Wife's counsel did not appear for that hearing. However, because he was present in court on November 14 and was aware of the November 27 hearing, Husband's counsel appeared in court and proceeded to present a judgment of divorce that he had prepared, representing to the court that the proposed judgment was "100 percent consistent with the agreement" reached in open court on November 2. At the November 27 hearing, Husband's counsel also submitted a "Memorandum in Support of [Husband's] Request for Post-Agreement Attorney Fees," seeking an award of attorney's fees pursuant to Md. Code (1984, 2019 Repl. Vol.), § 7-107 of the Family Law Article ("FL")[2] or Maryland Rule 1-341. With the Memorandum requesting attorney's fees, Husband's counsel submitted an affidavit in which he claimed that he had expended $4,100 in attorney's fees as a result of Wife's refusal to cooperate in the execution of the settlement documents. No testimony was taken at the November 27 hearing. The court took the matter under advisement.

On December 13, 2017, the court signed Husband's proposed judgment of divorce and issued a separate order awarding Husband's counsel a total of $6,000 in attorneys fees, $3,000 to be paid by Wife and $3,000 to be paid by Wife's counsel.[3]

[2] Although we cite to the 2019 Replacement Volume of the Family Law Article, Section 7-107 has remained unchanged since it went into effect in 1999.

[3] The December 13, 2017 judgment of divorce and attorney's fee order were not docketed until December 29, 2017.

On December 22, Wife filed a "Motion For Reconsideration, Or In The Alternative, Motion To Alter Or Amend." On March 14, 2018, the court denied Wife's motion for reconsideration without a hearing and without further explanation; that Order was not docketed until March 20, 2018.[4] Wife filed a Notice for *In Banc* Review on April 2, 2018.[5]

In her memorandum of law filed with the *in banc* court pursuant to Maryland Rule 2-551(c), Wife's counsel acknowledged that the court requested her to memorialize the parties' agreement as articulated in court at the November 2 hearing and prepare a proposed judgment of absolute divorce, which she was to hand-deliver to the judge's chambers by November 14. Because it became apparent that the parties would not be able to execute the settlement documents by November 14, Wife's counsel represented that she contacted the judge's chambers on November 14 and, after speaking to his administrative assistant, was informed that the judge agreed to extend the deadline for submission of settlement documents until November 27. Wife's counsel notified Husband's counsel by e-mail that the judge had extended the deadline until November 27 at 9:00 a.m., but she expressed her desire to have the settlement documents executed no later than November 21 because she would not be in the office "for the remainder of the week for the Thanksgiving holiday." By an e-mail dated November 20, Husband's counsel notified Wife's counsel that he

[4] Because Wife's motion was timely filed pursuant to Rule 2-534, the judgment did not become final for purposes of appeal until the docketing of the court's denial of her motion on March 20, 2018.

[5] Our review of the record verifies that Wife's counsel did not file a notice for *in banc* review of the $3,000 judgment entered against her.

intended to submit to the court his own proposed judgment of divorce, and advised Wife's counsel that she was "of course free to submit [her] own order and agreement as well." The November 20 e-mail also noted that Wife's counsel failed to appear for the November 14 hearing. In her Rule 2-551(c) Memorandum, Wife's counsel represented that she called the judge's chambers and spoke to his administrative assistant, "who indicated that not only did a disposition hearing not take place [on November 14], because the parties were granted an extension, but that [Husband's] counsel **was not in attendance**." (Emphasis in original). In light of Husband's counsel's November 20 e-mail, on November 22 Wife's counsel hand-delivered a proposed judgment of absolute divorce to the judge's chambers, and e-mailed a courtesy copy to Husband's counsel. Wife's counsel acknowledged that on November 25 Husband's counsel sent her an e-mail containing a copy of his proposed judgment of absolute divorce as well as a "Memorandum in Support of Post-Agreement Fees."

Based in part on these alleged procedural irregularities, Wife requested the *in banc* court to vacate the December 13, 2017 Order that awarded $6,000 in attorney's fees to Husband's counsel.

Husband moved to dismiss, asserting that Wife's Notice for *In Banc* Review was not timely filed. Because Rule 2-551(b) provides that the notice for *in banc* review shall be filed within ten days after entry of judgment, Husband claimed that Wife's filing on April 2, 2018—thirteen days after the March 20, 2018 docketing of the court's order denying Wife's motion for reconsideration—was untimely. As to the merits, Husband argued in a separate memorandum of law that the court acted within its discretion in

assessing attorney's fees against Wife and her counsel.

After hearing oral argument, the *in banc* panel issued a written opinion in which it, *inter alia*, denied Husband's motion to dismiss. In the *in banc* court's view, the procedural irregularities outlined by Wife—including the failure to notify Wife's counsel of the November 27 hearing—required vacation of the attorney's fees award. In making its decision, the *in banc* panel relied on the general revisory power provided in Rule 2-535(b), concluding that "[t]he failure of the clerk's office to follow a required procedure is an 'irregularity' within the meaning of Maryland Rule 2-535(b)." Husband noted this timely appeal.

STANDARD OF REVIEW

In *Hartford Fire Ins. Co. v. Estate of Sanders*, 232 Md. App. 24 (2017), Judge Deborah Eyler, writing for this Court, thoroughly explained the appropriate standard of review for appeals from decisions *in banc*. There, Judge Eyler explained that an *in banc* court "functions as a separate appellate tribunal[.]" *Id*. at 37 (internal quotation marks omitted) (quoting *Bienkowski v. Brooks*, 386 Md. 516, 553 (2005)). Because of its status as an appellate tribunal, the *in banc* court does not reconsider the decision of the trial court. *Id*. (citing *Dabrowski v. Dondalski*, 320 Md. 392, 396 (1990)). Rather, the *in banc* court must "engage in appellate review of the trial court's decision." *Id*. (quoting *Azar v. Adams*, 117 Md. App. 426, 429 (1997)).

Judge Eyler proceeded to explain this Court's role in reviewing a decision *in banc*, stating, "As an appellate tribunal, the in banc court 'is subordinate to this Court just as we are subordinate to the Court of Appeals.'" *Id*. at 38 (quoting *Azar*, 117 Md. App. at 433).

Judge Eyler compared our Court's role in reviewing an *in banc* decision to the Court of Appeals's role in reviewing a decision from our Court, noting that, in most instances, the appellate court ultimately reviews the judgment of the trial court. *Id*. Consistent with this principle, "[w]hen a pure question of law comes before either this Court or the Court of Appeals, the standard of review is *de novo*, that is, neither Court gives any deference to the trial court's interpretation of the law." *Id*. at 39 (citing *Nesbit v. Gov't Emps. Ins. Co*., 382 Md. 65, 72 (2004)). When reviewing a trial court's exercise of discretion, however, "our standard is abuse of discretion, which is highly deferential *to the trial court* that is the judicial body that exercised its discretion." *Id*. at 40 (citing *Goodman v. Commercial Credit Corp*., 364 Md. 483, 491-92 (2001)).

Judge Eyler also recognized that not every issue on appeal stems from a trial court decision.

> Of course, sometimes issues arise on appeal that emanate from this Court to begin with and that will be decided by the Court of Appeals on further review without reference to a decision of the trial court. For example, if we were to dismiss an appeal for lack of an appealable order, the Court of Appeals on further review would be assessing our decision, not a decision by the trial court. Likewise, if we were to decide upon vacating a judgment that a limited remand was the proper disposition, the Court of Appeals on further review would be assessing our decision about that disposition, which obviously originated with us, not with the trial court.

Id. at 40. Such is the case here, where the *in banc* panel—and not the trial court—denied Husband's motion to dismiss, thereby making the legal determination that it had the authority to consider Wife's *in banc* appeal. We therefore review whether the *in banc* panel properly denied Husband's motion to dismiss Wife's *in banc* appeal—a purely legal question—without deference to the *in banc* panel's decision. *Id*. at 39.

DISCUSSION

We hold that the *in banc* court erred by declining to dismiss Wife's *in banc* appeal as untimely. Rule 2-551(b) provides that "the notice for in banc review shall be filed within ten days after entry of judgment." Rule 2-551(g)(1) provides that the *in banc* panel "shall dismiss an in banc review" if the notice for *in banc* review was "not timely filed." We initially reject Husband's argument that Rule 2-551(g)(l)'s use of the phrase "shall dismiss" means that the failure to timely note an *in banc* appeal is "jurisdictional" and must be dismissed. Because Rule 2-551(b) imposes a filing deadline based on a court-made rule rather than on a statutory or constitutional provision, it is not "jurisdictional." *Rosales v. State*, 463 Md. 552 (2019).[6] *Rosales* teaches that the basis for dismissal because of the failure to timely file a notice of appeal "is not lack of jurisdiction, but failure to comply with the Maryland Rules." *Id.* at 557. Although *Rosales* interpreted Rule 8-202(a) governing appeals to the Court of Appeals and this Court, we see no reason why *Rosales*'s reasoning would not be applicable to Rule 2-551 governing *in banc* appeals. Accordingly, "as the Rule is not jurisdictional, a reviewing court must examine whether waiver or forfeiture applies to a belated challenge to an untimely appeal." *Id.* at 568.

Turning to the present case, the record shows that the final judgment was entered

[6] In explaining why he incorrectly referred to the issue as "jurisdictional" in his opening brief, Husband asserted in his reply brief that *Rosales* "seem[s] to mark a sharp break with Maryland precedent[.]"

on March 20, 2018, when the clerk docketed the court's denial of Wife's motion for reconsideration. Under Rule 2-551(b), Wife had until Friday, March 30, 2018, to file her notice for *in banc* review. Her filing on Monday, April 2, 2018, was therefore untimely.[7] Because Wife's untimely filing was based on a court rule rather than a statute or constitutional provision, *Rosales* instructs the reviewing court to examine whether "waiver or forfeiture applies." *Id.* Here, Husband moved to dismiss Wife's notice for *in banc* review on May 3, 2018. This motion represented Husband's initial filing with the *in banc* court and was filed just one day after Wife filed her *in banc* memorandum. Husband continued to argue for dismissal at the June 28, 2018 hearing before the *in banc* panel. We are convinced that there is no basis in the record for us to conclude that Husband waived or forfeited his claim that Wife's filing was untimely.[8] Accordingly, the *in banc* court erred when it denied Husband's motion to dismiss Wife's notice for *in banc* review.[9]

JUDGMENT OF THE IN BANC PANEL IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY VACATED. CASE REMANDED WITH INSTRUCTIONS TO

[7] We note that Wife argued to the *in banc* panel that she did not receive notice of the court's denial of the motion for reconsideration until April 2, 2018. However, Wife never filed a written response to Husband's motion to dismiss and the *in banc* panel never addressed whether the mailing of the order denying her motion for reconsideration was "irregular."

[8] Although Wife contends that it would be "inequitable" to deny review, she does not make any argument that "waiver" or "forfeiture" apply in this case.

[9] Because a Rule 2-535(b) motion can be filed "at any time," Wife and Wife's counsel would not be precluded from requesting the court to exercise revisory power over its judgment due to fraud, mistake, or irregularity. Although the issue is not before us, we agree with the *in banc* panel that "irregularity" permeates these proceedings.

GRANT APPELLANT'S MOTION TO DISMISS APPELLEE'S NOTICE FOR IN BANC REVIEW. COSTS TO BE PAID BY APPELLEE.