2010 WL 2256895 (Md.App.) (Appellate Brief)
Maryland Court of Special Appeals.

Phillip Mark SHAFER, Appellant,
v.
Nancy FORSTER, et al., Appellees.

No. 2428.
September Term, 2008.
January 4, 2010.

On Appeal from the Circuit Court for Anne Arundel County (Ronald A. Silkworth, Judge)

Brief of Appellees

Douglas F. Gansler, Attorney General of Maryland; Kathryn M. Rowe, Dan Friedman, Assistant Attorneys General, 90 State Circle, Room 104, Annapolis, Maryland 21401-1991, (410) 946-5600, Attorneys for Appellees.

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***1** STATEMENT OF THE CASE

On March 3, 2008, Phillip Mark Shafer ("Shafer") filed a "Civil Complaint" against Nancy Forster, Public Defender of Maryland; four employees of the Office of the Public Defender; Brian E. Frosh, Chairman of the Judicial Proceedings Committee; and the State of Maryland ("State defendants"), as well as the Washington County Commissioners and Washington County, seeking declaratory relief and monetary damages. (Apx. 14-17.) The complaint stated that:

***2** Defendants, under color of law have knowingly, willfully, voluntarily and maliciously and/or negligently violated the Plaintiff Shafer's rights. The acts and omissions described in this complaint were carried out, individually, and/or in solicitation for conspiracy, with the intentional infliction of emotional duress, causing Shafer the tortuous mental anguish, undue physical pain and suffering, undue indignified humiliation and other damages. (Apx.16.)

The complaint went on to charge legal malpractice; dereliction of duty; fraud; obstruction of justice; "conspiracy to commit violations"; "knowledge and acquiescence"; "violating Maryland law, ethics rules, COMAR, cannon [sic]"; "violating Maryland Rules of Professional Conduct"; and "violating Maryland [Declaration of Rights]." (Apx. 16.) The complaint contained absolutely no factual allegations about anything that had happened to Mr. Shafer, or about how any of the defendants might have been involved. On May 29, 2008, the Circuit Court for Anne Arundel County issued its standard scheduling order. (Apx. 18-21.)

The State Defendants moved to dismiss the complaint on June 12, 2008 based on the failure to state a claim on which relief could be granted and the failure to make factual allegations; the motion also asserted legislative immunity on behalf of Senator Frosh. (Apx. 22-30.) That motion was granted on July 24, 2008, by an order dismissing the claims against the Public Defender and her employees and dismissing the claims against Senator Frosh with prejudice. (Apx. 31-32.) The July 24 Order also denied Mr. Shafer's (1) Emergency Motion for Expedited Injunction Barring Representation or Participation By defendants in Shafer's Criminal Cause, (2) Petition Requesting Blank Subpoena Duces Tecum Forms, (3) Petition for a Writ of Attachment on the Defendants, and (4) Motion for Extension of Time. (Apx. 31-32.)

***3** Subsequently, Mr. Shafer filed an "Affidavit and Motion to Vacate Judgement Due To Extrinsic Fraud, Jurisdictional Mistake, and Clerical Irregularity." (Apx. 35-63 (hereinafter "Motion to Vacate,")) This document made broad allegations of fraud, abuse of power, malice, and official wrongdoing by the trial court in granting the State Defendants' motion to dismiss and denying Mr. Shafer's motions, and by the clerk of the circuit court, but again provided no *factual* evidence or allegations to support these broad accusations. Mr. Shafer demanded that the order dismissing the case be vacated, that a protective order

be imposed against the presiding judge and the clerk, that counsel be appointed, that polygraph examinations be ordered of "various government officials, agents and employees" and for such other and further relief as "the public's interest demanding judicial integrity and fundamental fairness may require." (Apx. 40-41.) The requested relief was denied by the trial court on December 5, 2008. [1] (Apx. 64.)

Mr. Shafer appealed from this dismissal, arguing that the circuit court's May 29, 2008 scheduling order gave him until September 5, 2008 to add a party or amend a claim and that therefore his case could not be dismissed until he had the chance to amend. In an order dated September 11, 2009, this Court issued a *sua sponte* order limiting this appeal to the question of whether the trial court abused its discretion in its denial of Mr. Shafer's Affidavit and Motion to Vacate. (Apx. 79-82.)

*4 QUESTION PRESENTED

Whether the trial court acted within its discretion in refusing to exercise its revisory power in this case.

STATEMENT OF FACTS

In February 2005, Mr. Shafer was charged with **exploitation** of a vulnerable adult and theft over $500 as a result of his handling of his **elderly** grandmother's **finances**. (Apx. 50; 66.) He pled not guilty with respect to both charges and, after a trial held November 15, 2005, he was convicted of theft over $500 and sentenced to 15 years imprisonment. (Apx. 66; 68.) Mr. Shafer filed an appeal that was ultimately dismissed by this Court. (Apx. 76-77.) A petition for a writ of habeas corpus was also unsuccessful. (Apx. 78.) Mr. Shafer's appeal of the denial of his habeas corpus petition was dismissed, and the petition for certiorari was denied. *Shafer v. State*, 406 Md. 747 (2008). Post-conviction motions have not yet been heard, and are not currently set for a hearing. (Apx. 73-74.) Mr. Shafer was represented by the Office of the Public Defender in the criminal case, the appeal, and the post-conviction cases. (Apx. 65-74).

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DISMISSING THE MOTION TO VACATE THE JUDGMENT DUE TO EXTRINSIC FRAUD, JURISDICTIONAL MISTAKE, AND CLERICAL IRREGULARITY.

Maryland Rule 2-535(b) permits a court to exercise its revisory power over a judgment entered more than 30 days before the filing of a motion only on a showing of fraud, mistake, or irregularity. *See Himes v. Day*, 254 Md. 197, 202 (1969). This showing must be made by clear and convincing evidence. *See* ***5** *Davis v. Attorney General*, 187 Md. App. 110, 123-124 (2009). Cases interpreting this rule have held that the terms "fraud," "mistake," and "irregularity" are "narrowly defined and are to be strictly applied." *Early v. Early*, 338 Md. 639, 652 (1995). This narrow construction is necessary to preserve the vital interests of the public and parties in the finality of judgments. *See Haskell v. Carey*, 294 Md. 550, 558 (1982). Thus, Maryland's strong public policy favoring finality and conclusiveness of judgments can be overcome only by a showing "that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy." *Bland v. Hammond*, 177 Md. App. 340, 350 (2007).

The standard of review in an appeal from a refusal by a trial court to exercise revisory power under Rule 2-535(b) is whether there has been an abuse of discretion. *See Jones v. Rosenberg*, 178 Md. App. 54, 72 (2008). Abuse of discretion occurs "where no reasonable person would take the view adopted by the [trial] court," or when the court acts "without reference to any guiding rules or principles." *Bland*, 177 Md. App. at 346-47. An abuse of discretion has also been said to exist when the ruling under consideration "appears to have been made on untenable grounds," when the ruling is "clearly against the logic and effect of facts and inferences before the court," when the ruling is "clearly untenable, unfairly depriving a litigant of a substantial right

and denying a just result," when the ruling is "violative of fact and logic," or when it constitutes an "untenable judicial act that defies reason and works an injustice." *Id*. at 346.

"Fraud" under Rule 2-535(b) must be extrinsic rather than intrinsic fraud. *See Tandra S. v. Tyrone W.*, 336 Md. 303, 315 (1994). Intrinsic fraud is defined as that which pertains to issues involved in the original action or where acts constituting fraud were, or ***6** could have been, litigated therein. *See id*. at 316. Extrinsic fraud on the other hand, is fraud that is collateral to the issues tried in the case where the judgment is rendered. Fraud is extrinsic when it actually prevents an adversarial trial. *See id*. It is well settled that in alleging fraud "particular facts must be stated and no mere allegations of fraud are sufficient." *Wooddy v. Wooddy*, 256 Md. 440, 451 (1970).

"Mistake" as used in Rule 2-535(b), is limited to a jurisdictional error, such as where the Court lacks the power to enter the judgment. *See Claibourne v. Willis*, 347 Md. 684, 692 (1997). Mistakes by the litigants do not justify the exercise of the revisory power of the courts. *See id*.

An "irregularity" as used in Rule 2-535(b), means "the doing or not doing of that, in the conduct of a suit at law, which, conformable to the practice of the court, ought or ought not to be done." *Early*, 338 Md. at 652. Section 6-408 of the Courts and Judicial Proceedings Article specifies that the courts' exercise of the revisory power is appropriate where an employee of the court or of the court or of the clerk's office fails to perform a duty required by statute or rule. Thus, irregularity, in the contemplation of the rule, usually means irregularity of process or procedure, and not an error, which in legal parlance, generally connotes a departure from truth or accuracy of which a party had notice and that it could have challenged. *See Weitz v. MacKenzie*, 273 Md. 628, 631 (1975).

In addition to the required showing of fraud, mistake, or irregularity, a party seeking revision of a judgment must show that it has acted in good faith and with due diligence, and that the party has a meritorious cause of action. *See Tandra S.*, 336 Md. at 314.

***7** In summary, Rule 2-535 places strict requirements on a person who would have a court revise an enrolled judgment after 30 days, Shafer has failed on all counts.

A. There Has Been No Showing Of Fraud, Mistake, Or Irregularity That Would Justify Revision Of The Enrolled Judgment In This Case.

Mr. Shafer's allegations of fraud, mistake, and irregularity are all directed at the actions of the trial court and of the clerk, and not at the actions of the parties.[2] He does not allege that the Public Defender defendants or Senator Frosh were in any way involved in the "fraud" of which he complains. *See Hamilos v. Hamilos*, 297 Md 99, 105 (1983) ("policy favoring finality and conclusiveness can be outweighed only by a showing that the jurisdiction of the court has been imposed upon, or that the *prevailing party*, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy" (emphasis added)). Moreover, the actions of which he complains do not amount to fraud. Specifically, Mr. Shafer complains of the action of Judge Silkworm in denying his motions, dismissing his action, and dismissing the case against Senator Frosh with prejudice as fraudulent. It is clear, however, that mere adverse rulings cannot amount to fraud. Rather, even an adverse ruling that is in fact incorrect does not constitute fraud, mistake, or irregularity permitting revision of an enrolled judgment. *See Weitz v. MacKenzie*, 273 Md. 628, 631 (1975); *Thacker v. Hale*, 146 Md. App. 203, 221-22 (2002); *Home Indem. Co. v. Killian*, 94 Md. App. 205, 217-28 (1992).

***8** Mr. Shafer further argues that there was fraud, mistake, and irregularity in the action of Judge Silkworth in dismissing his case when the form scheduling order provided that the complaint could be amended up until September 5, 2008. In *Clark v. O'Malley*, 169 Md. App. 408, 420-21 (2006), this Court considered a claim that a trial court had erred in granting a motion for summary judgment before the time granted for discovery under the scheduling order had terminated. Because Maryland Rule 2-501 permits the grant of summary judgment without reference to the terms of any scheduling order, the Court found that the "status of the scheduling order, in and of itself, ha[d] no direct bearing on whether the court's grant of summary judgment prior

to the completion of discovery was an abuse of discretion," and found no error or abuse of discretion in the grant of summary judgment. *Clark*, 169 Md. App. at 421.

Similarly, Maryland Rule 2-322, which governs motions to dismiss, makes no reference to scheduling orders. In fact, the rule expressly requires that some motions be made before an answer is filed, which is ordinarily 30 days after, service of the complaint. Maryland Rules 2-322(a), 2-321(a). Thus, the Court did not err by granting the State Defendants' motion to dismiss before the deadline for amendments to the pleadings set forth in the scheduling order, and the court's action in doing so cannot be considered fraud, mistake, or irregularity. [3]

***9** Mr. Shafer further argues fraud, mistake, and irregularity in the actions of the Clerk in rejecting his complaint when it was initially filed in January of 2008, withholding the docketing and service of the scheduling order for 44 days, sending subpoena forms rather than subpoena duces tecum forms, refusing to issue subpoena forms without a trial date, withholding the order dismissing the case in order to deprive him of an opportunity to file a motion to alter or amend the judgment within ten days under Maryland Rule 2-534, and in allegedly discarding his Rule 3-535 Motion to Vacate when he did file it. (Apx. 38-40.) None of these claims amount to fraud, mistake, or irregularity.

It is true that when Mr. Shafer initially filed his complaint, in January 2008, it was returned to him with a note saying that it was sent to the court in error and should have been filed in the Circuit Court for Allegany County. (Apx. 55.) The complaint was, however, accepted when it was refiled in March 2008. (Apx, 3.) Thus, the refusal was not prejudicial to Mr. Shafer and cannot be said to have affected the final judgment. The initial rejection of his complaint did not prevent the consideration of his law suit, and cannot form the basis for revision of the judgment under Rule 2-535(b).

The scheduling order was dated May 29, 2008 and was docketed and mailed to the parties on June 5, 2008. (Apx. 7; 18-21.) The docket reflects that the scheduling order was mailed to an additional attorney on June 18, 2008 simply because a new attorney had entered the case on behalf of the defendants. (Apx. 8.) There was no undue delay or irregularity in the docketing or mailing of the scheduling order. Similarly, the order dismissing the case was signed July 17, 2008, but it was not entered until July 24, 2008. (Apx. 9; 31-32.) Mr. Shafer states that he received the order on July 28, 2008 (Apx.37) ***10** leaving him six days of the ten to file a motion under Rule 2-534. Mr. Shafer makes no allegation that would support the conclusion that he was prejudiced in his ability to file a timely motion. Mr. Shafer's complaint about the subpoenas reflects his misunderstanding of the process rather than any irregularity on the part of the clerk's, office.

The claim that the clerk received his Motion to Alter or Amend Judgment and discarded it rather than filing it in the case would amount to irregularity, if it were demonstrated by clear and convincing evidence. *See May v. Wolvington*, 69 Md. 117, 122 (1888); Md. Code Ann., Cts. & Jud. Proc. § 6-408. The clerk is a public servant, and there is a strong presumption that he properly performs his duties. *See Schowgurow v. State*, 240 Md. 121, 126 (1965). The sole "evidence" offered by Mr. Shafer with respect to the filing of this document is a letter written by Mr. Shafer to a third party in which he mentions filing it. (E. 6.) He has not presented a certificate of service or any other document tending to show that the document was, in fact, mailed. Thus, he has fallen far short of the requirement that he show fraud, mistake, or irregularity by clear and convincing evidence. Moreover, the alleged failure occurred after his case had been (correctly) dismissed. As a result, the clerk's alleged actions cannot be said to have prevented the actual dispute from being presented to the fact finder as required by the cases interpreting Rule 2-535(b). *See Bland*, 177 Md. App. at 350. Thus, the allegation that the clerk received the Motion to Vacate and disposed of it rather than filing it does not state a basis for revision of an enrolled judgment.

Finally, Mr. Shafer makes the bald allegation that Judge Silkworth acted without jurisdiction in the case, and therefore his actions amount to mistake. The term "mistake," ***11** as used in Rule 2-535, is limited to a jurisdictional error, such as where the Court lacks the power to enter the judgment. *See Claibourne*, 347 Md. at 692. Typically, such a lack of jurisdiction arises when a judgment has been entered in the absence of valid service of process, with the result that the court has no jurisdiction over a party. *See id*. Another circumstance is where the court is without authority to pass upon the subject matter involved in the dispute. *See Thacker*, 146 Md. App. at 225. In this case, the parties were properly served and the trial court had personal

jurisdiction. Presumably, Mr. Shafer agrees that the trial court had subject matter jurisdiction, or he would not have filed the suit. Thus, there was no mistake.

In summary, Mr. Shafer's case of fraud, mistake, and irregularity amounts to the mere recitation of those words. The deficiencies in Mr. Shafer's appeal thus mirror the fundamental defect in his complaint, which contained not so much as a single factual allegation. In his appeal, Mr. Shafer does not allege actions amounting to fraud or mistake, and to the extent that he does allege irregularity, he fails to proffer evidence to support his claims. It is clear that a finding of fraud, mistake, or irregularity cannot be based on mere allegations, but must be supported by clear and convincing evidence. *See Wooddy*, 256 Md. at 451 ("It is well settled that in alleging fraud 'particular facts must be stated and no mere allegations of fraud are sufficient.' "); *Berwyn Fuel & Feed Co. v. Kolb*, 249 Md. 475, 478 (1968) (rejecting "conjecture" as evidence of fraud, mistake, or irregularity); *Williams v. Snyder*, 221 Md. 262, 270 (1959) (bare statement of fraud, mistake, or irregularity not sufficient); *Jones v. Rosenberg*, 178 Md. App. 54, 74 (2008) (upholding dismissal of revisory motion containing no "probative evidence" of fraud, mistake, or irregularity, and stating burden of proof as clear and convincing evidence).

***12 B. Mr. Shafer Has Not Acted With Due Diligence.**

Rule 2-535(b) not only requires a showing of fraud, mistake, or irregularity, but also requires a showing that the party has acted in good faith and with due diligence. *See Early*, 338 Md. at 664. The judgment in this case was entered on July 24, 2008. Mr. Shafer states that he filed his Motion to Vacate "immediately" upon receiving the order dismissing the case on July 28, 2008. (Appellant's Brief at 22.) He waited until August 22, 2008, however, to inquire whether it had been received. (E. 7.) A party to litigation has the duty of keeping track of what occurs in the case. *Wooddy*, 256 Md. at 455. Failure to do so demonstrates a lack of diligence. *See Cohen v. Investors Funding Corp.*, 267 Md. 537, 541 (1973). While Mr. Shafer's incarceration undoubtedly hampers his ability to communicate, information about court dockets is available by phone, by mail, and on the Internet. Mr. Shafer, like other litigants, has the responsibility to keep track of what is happening in his case.

C. Mr. Shafer's Underlying Claims Are Without Merit.

In addition to a showing of fraud, mistake, or irregularity, and a showing that a party has acted in good faith and with due diligence, Rule 2-535 requires that the party show that the underlying action is meritorious. *Tandra S.*, 336 Md. at 314. Mr. Shafer cannot make this showing.

Mr. Shafer's complaint made generalized statements asserting violations of his rights by the defendants, along with conspiracy, and intentional infliction of emotional duress. (Apx. 16.) The complaint also mentions legal malpractice. (Apx. 16.) It does not, however, support these allegations with a single assertion of fact. The complaint does not even indicate what case -- or transaction or occurrence -- is the basis for his ***13** various claims. If he is complaining about the representation he has received as a criminal defendant, the complaint does not indicate what the legal issues were, much less how his attorneys might have violated his rights in the course of those cases. [4] As a result, the case was dismissed for failure to state a claim on which relief could be granted and failure to comply with Maryland Rule 2-303. (Apx. 31-32.) That Mr. Shafer failed to state a claim when he had the opportunity makes him ineligible for revision of the judgment. *See Household* ***Finance*** *Corporation v. Taylor*, 254 Md. 349, 355 (1969); *Williams v. Snyder*, 221 Md. 262, 268-69 (1959); *Thomas v. Hopkins*, 209 Md. 321, 326 (1956).

The claim concerning Senator Frosh is completely lacking in merit, in that there is no amendment that could be made to the complaint that would overcome legislative immunity. The only mention of Senator Frosh in the complaint does no more than identify him as a party. (Apx. 15-17.) In his Motion to Vacate, however, Mr. Shafer asserts that "the Senator knowingly created or passively consented extra-legislatively to unconstitutional legislation, [which] constituted a willful refusal by the judicial branch to hold the legislature accountable to the people, denying Shafer access to the court for meaningful redress of grievances against the legislature." (Apx. 38.) It is not clear exactly to what this accusation refers, but it is completely clear that it could only refer to the Senator's legislative actions. Article III, § 18 of the Maryland Constitution provides that "[n]o Senator or

Delegate shall be liable in any civil action, or criminal prosecution, whatever, for words spoken in debate." Article 10 of the Maryland Declaration of Rights ***14** provides that "freedom of speech and debate, or proceedings in the Legislature, ought not to be impeached in any Court of Judicature." The combined effect of these provisions is to endow legislators with absolute immunity from suits based on their legislative actions. *See Blondes v. State*, 16 Md. App. 165 (1972). Absolute immunity protects legislators so long as their acts are legislative in nature. *See Mandel v. O'Hara*, 320 Md. 103, 107 (1990). The assertion of absolute immunity is "a defense of failure to state a claim on which relief can be granted." *Id*. at 134. Because the claims against Senator Frosh involve only his actions with respect to the laws of Maryland, he has absolute immunity, and the claims against him are without merit.

CONCLUSION

For the reasons stated above, the decision of the Circuit Court for Anne Arundel County denying the Motion to Vacate in this case should be affirmed.

Appendix not available.

Footnotes

1 The December 5, 2008 order also denied Mr. Shafer's request for a hearing on the Motion to Vacate. While there are instances where a hearing on a motion to revise a judgment under Rule 2-535(b) may be required, *see Accrocco v. Splawn*, 264 Md. 527, 536 (1972), the grant or denial of a motion without a hearing should be upheld where the record shows that the court's action was correct, *see Thomas v. Hopkins*, 209 Md. 321, 324-325 (1956); *Alban Tractor Co., Inc. v. Williford*, 61 Md. App. 71, 80 (1984).

2 Mr. Shafer's brief is largely devoted to issues outside the scope of this appeal, including challenges to earlier orders of this Court. Greater detail as to his actual allegations with respect to the Motion to Vacate can be found in that motion. (Apx. 35-65.)

3 Mr. Shafer also argues irregularity in the form of a violation of Rule 2-322(c), which he claims prevents a court from granting a motion to dismiss unless he fails to file a timely amended complaint. (Appellant's Brief at 10). This provision, of course, applies only if the party opposing the motion has sought and received leave to amend under Rule 2-322(c)(2), and subsequently fails to file the amended complaint in the time granted.

4 The failure of post-conviction relief would, in itself, be an independent basis for dismissal of malpractice claims against the Public Defender parties. *See Berringer v. Steele*, 133 Md. App. 442, 484 (2000).

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