UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0891

September Term, 2012

ANDREW KIM

v.

HEATHERWOOD, LLP, ET AL.

Eyler, Deborah S.,
*Watts,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: November 6, 2013

*Shirley M. Watts, now serving on the Court of Appeals, participated in the hearing and conference of this case while an active member of this Court; she participated in the adoption of this opinion as a specially assigned member of this Court.

Andrew Kim ("Kim"), by counsel, brought a negligence action in the Circuit Court for Baltimore City against Heatherwood, LLP, and Henderson/Web, Inc. (hereinafter referred to collectively as "Heatherwood"). On June 10, 2012, a Baltimore City Circuit Court judge, in open court, orally dismissed Kim's complaint for failure to state a cause of action upon which relief could be granted. The basis for the ruling was that, purportedly, the complaint was filed more than three years after Kim's negligence action accrued. After Kim filed an appeal, Heatherwood filed a motion to dismiss the appeal.

Based on Heatherwood's representation concerning the date a final judgment was entered, this Court filed an order on November 13, 2012, that read, in material part, as follows:

> It appears that, by order dated January 10, 2012 and entered on the docket on January 18, 2012, the Circuit Court for Baltimore City . . . granted Defendant/Appellee's Motion to Dismiss for failure to state a claim upon which relief could be granted based upon the expiration of the statute of limitations. It also appears that on February 9, 2012, Appellant filed a Motion for New Trial, which motion, filed more than ten days after the entry of judgment, did not affect the time for noting an appeal. In an order dated May 2, 2012 and entered on the docket on May 7, 2012, the circuit court denied the Motion for New Trial. Appellant filed his Notice of Appeal on Behalf of the Plaintiff on June 6, 2012. Because the appeal was untimely as to the judgment entered on January 18, 2012, but timely as to the denial of the Motion for New Trial, it is . . . by the Court of Special Appeals,
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> ORDERED that the Motion to Dismiss Appeal is denied. It is, however, further
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> ORDERED that the sole issue to be determined on appeal to this Court shall be limited to "Whether the trial court abused its discretion in its denial of Appellant's Motion for New Trial."

Due to our order of November 13, 2012, Kim narrowed the principal issue to be addressed in this appeal (which we have re-worded) as follows. Did the trial court abuse its discretion when it denied the post-trial motion Kim filed on February 9, 2012?

I.
Allegations in Kim's Complaint

Kim rented a townhouse located at 961 Honeywood Place, Baltimore Maryland, that was owned, operated, controlled and managed by Heatherwood. In January, 2007, Kim notified Heatherwood's agent that he would not be renewing his lease, the term of which was set to expire in March, 2007. Accordingly, prior to the end of March, 2007, Kim vacated the leased premises.

A little over two months later, on June 3, 2007, those premises caught fire. Police officers who investigated the origin of the fire discovered "that the fire had started as a result of a marijuana growing operation that was . . . [taking place] on the [leased] Premises" or (in the alternative) the police discovered "marijuana at those Premises." Investigating police officers contacted Heatherwood's agents and inquired as to the names of the tenants "and/or other individuals" who resided at the townhouse. One or more of Heatherwood's agents informed the police, incorrectly, that Kim, was in fact "a tenant and/or a resident of the Premises - even though Kim had not been a tenant and/or a resident at the Premises for over two months . . . ." As a result of this inaccurate information, criminal charges were brought charging Kim with manufacturing and distribution of a controlled substance and related charges. A warrant for Kim's arrest was also issued.

In August, 2007, Kim, who was at that time unaware of the charges or the arrest warrant, visited Canada. When he returned to the United States on August 11, 2007, the arrest warrant was served. Kim was extradited from Niagra County, New York "approximately one week after his arrest." He was then transported, as a fugitive, back to Maryland and at that time was served with the charging documents.

Paragraph 14 of the Complaint read:

> Mr. Kim, despite due diligence on his part, did not discover the afore-referenced negligence, and/or facts which give rise to his causes of action against . . . [Heatherwood] until after a significant amount of time had passed, after the fire had occurred, after charges had been filed against him, after he had been remanded to prison in New York and after he read the charging documents upon his return to Maryland.

The complaint further alleged that as a result of Heatherwood's negligence Kim "suffered damages [that] include, but [were] not limited to, bodily harm, physical harm, emotional distress, humiliation and financial loss."

II.
Proceedings in the Circuit Court

Kim filed suit in the Circuit Court for Baltimore City. The exact date of that filing will be discussed *infra*. After Heatherwood filed a timely answer to the complaint, a scheduling order was filed setting January 10, 2012 as the trial date. Additionally, the scheduling order required that all dispositive motions be filed no later than November 23, 2011.

On the morning that trial was set to commence, Heatherwood filed a "motion to dismiss or for summary judgment." The motion to dismiss relied on allegations in the

complaint but the motion for summary judgment was supported by: 1) answers Kim gave at his deposition; 2) interrogatory answers by Kim; 3) a District Court of Maryland case Information document; and 4) the docket entries in the subject case. In Heatherwood's Memorandum in support of the motion to dismiss or for summary judgment, the following arguments were put forth:

> In the instant action, Andrew Kim was arrested on August 11, 2007. According to his own testimony, he was advised at that time that he was being arrested on marijuana charges initiated in Maryland. (Deposition of Andrew Kim, p. 71, ll. 7-15)[.] It is presently submitted that as of August 11, 2007, when the plaintiff was told that he was being arrested, and what the charges were, his cause of action accrued. Even at the latest, however, when Mr. Kim was extradited to Maryland, brought before a court commissioner, and posted bail on August 21, 2007 (*see,* District Court of Maryland Case Information, copy attached). He was on the "inquiry notice" necessary to begin the running of the statute of limitations. Thus, either on August 11, 2007, and not later than August 21, 2007, the plaintiff's cause of action accrued against the defendants in this case. In consequence of that knowledge, Kim was required to file his action against these defendants not later than August 21, 2010.
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> The court file in this case makes it clear that Mr. Kim did not file suit until September 23, 2010. Although there appears to be an earlier "RECEIVED" stamp on the face of the Complaint which is dated August 11, 2010, with an apparent time of 4:31 p.m., no indication exists that the Complaint was <u>filed</u> on that date (or even the following date, in the event the clerk did not file the pleading after normal business hours); the only record in this Court that the instant action was <u>filed</u> is the stamp by the Civil Division of the Circuit Court for Baltimore City [,] which clearly indicates a date of "SEP 23, 2010." (September 23, 2010).

At the motions hearing Heatherwood's counsel changed his position somewhat and steadfastly maintained that Kim's cause of action accrued on the date that he knew of his injury, which was August 11, 2007 (the date that he was arrested on the marijuana charge).[1]

Kim's attorney, who had only received a copy of Heatherwood's motion approximately two hours earlier, pointed out to the motions judge that he could not grant the motion to dismiss (as opposed to the summary judgment motion) because to do so, the court would have to consider facts that were not in the complaint. Counsel for Kim next told the court that the complaint was received by the clerk's office on August 11, 2010, as shown by the stamp on the complaint that was in the court jacket. After the complaint was filed, according to Kim's counsel, an employee of the clerk's office mailed the complaint back to him. In this regard Kim's counsel asked the court for permission to call Derek Gillis of the clerk's office as a witness. Counsel proffered that Gillis would testify "that the Complaint was sent back due to a clerk mistake." Therefore, counsel argued, the correct filing date should in fact be August 11, 2010 and not September 23, 2010.

Without hearing from Mr. Gillis, the motions judge ruled:

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[1]This clearly was not an accurate statement of the applicable law. Under the discovery rule, a cause of action does not accrue [i.e., the statute of limitations does not start to run] until the plaintiff knows or should know of the injury, its probable cause and . . . [the defendant's wrongdoing] . . . *United v. People's Counsel*, 336 Md. 569, 579 (1994) (quoting *Hecht v. Resolution Trust*, 333 Md. 324, 336 (1994)). *See also, Pennwalt Corp. v. Nasios*, 314 Md. 433, 452 (1988). Nothing in the Complaint showed that Kim knew, or should have known, on August 11, 2007 of the probable cause of his injury or of Heatherwood's wrongdoing.

> The Court, having had an opportunity to review the Defendant's Motion to Dismiss based upon Maryland Rule 2-322(b), specifically failed to state a claim upon which relief can be granted. And the Court's view of pertinent case law in this case, the court having reviewed that motion and received the pleadings to determine their sufficiency, and again, the Court is directed to paragraph 11 of the Defendant's (sic) complaint.[2] That does set the date of August 11, 2007, as of the date of, I guess, notice of the wrong was certainly known to the Defendant.
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> And the Court, having assumed the truth of the facts pled in the complaint and all reasonable inferences to be drawn thereto, the material facts, I guess, in the light most favorable even to the Plaintiff in this case, [it] is clear on the four corners of the pleadings that this case was not filed until approximately six weeks after the three year Statute of Limitations would have run. And for that reason, and that reason alone, the Court will grant the motion to dismiss with prejudice.

The motions judge, after stating that he had already made his decision, then said that he would allow Kim's counsel to make a formal proffer of Mr. Gillis's anticipated testimony. The following colloquy then ensued:

> KIM'S COUNSEL: I'll tell you exactly what he would testify to Judge. The case was sent back in the mail by the clerk by mistake. And it should not have been sent back to me. And it should have been deemed filed from August the 11th. And I'm telling you, as an officer of the Court, when I finally got this in the mail, I was down within one, two days at the most. I met with the clerk himself and he said it was a mistake. And he said it would be deemed filed as

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[2]Paragraph 11 of the Complaint read:

> Mr. Kim, unaware that criminal charges had been filed against him, booked a vacation to Canada in August of 2007. Upon his return to the United States, from Canada, on, about or after August 11, 2007, Mr. Kim, as a result of the outstanding arrest warrant that had been issued against him, was detained and, eventually, was arrested at the border. Mr. Kim was then remanded to a prison in Niagara County, New York.

(Emphasis added).

of the date that I brought it down myself, August 11th. But I would - I can't speak - I can't speak in terms of the details of the-

THE COURT: No, but you've given us a gist of what you believe he would testify to.

KIM'S COUNSEL: But can you at least take the five minutes necessary to hear the man speak? Because I think he's going to be quite persuasive.

THE COURT: All I'm saying is I don't think it's necessary for me to look beyond the four corners of the pleading. As to the issue of Statute of Limitations, it was raised in the answer, I gave you an opportunity - I guess on the legal issue as to the Statute of Limitations. I've not heard any legal arguments as to why the Statute of Limitations has not been violated. So I'm sorry for the result, but that's the court's ruling.

KIM'S COUNSEL: Well, I got this motion. Well, could you please listen to the gentleman's testimony?

THE COURT: Respectfully, no. Thank you though, gentlemen.

On the same day that the motions judge orally ruled in favor of Heatherwood, the judge signed an order granting Heatherwood's motion to dismiss. That order was docketed on January 18, 2012. On February 10, 2012, Frank M. Conaway, the Clerk of the Baltimore City Circuit Court, signed a judgment, which read in relevant part: "the complaint is dismissed without leave to amend . . . [c]osts are assessed against Plaintiff/Andrew Kim."

III.
Kim's February 9, 2012 Motion

One day before the Order signed by the Clerk was docketed, Kim's counsel filed a pleading that was awkwardly titled: "Plaintiff's Motion to Correct the Applicable Docket Entries to Reflect the Date on Which his Complaint was actually filed with the Clerk's Office

and Motion for New Trial" (hereinafter referred to as "the February 9, motion"). The February 9 motion was supported by an affidavit signed by Kim's counsel. The affidavit, in material part, read as follows:

> The undersigned, on August 10 (sic), 2010,[3] filed with the Clerk's office of the Circuit Court for Baltimore City (along with a check for the appropriate filing fee), the Complaint and Election for Jury Trial, relative to the above-captioned case. At the time of the undersigned's filing of the Complaint and Election for Jury trial, the undersigned had, in fact previously signed the last page of the Complaint. However, at the time that the Complaint and Election for Jury Trial was filed with the Clerk's Office of this Court, the undersigned had inadvertently not signed the separate document, that was entitled "Plaintiff's Election for Jury Trial" and that was attached to the end of that Complaint.
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> Accordingly, at the time that the Plaintiff's Complaint and Election for Jury Trial was filed, with the Clerk's Office of the Circuit Court for Baltimore City, that document had, in fact, had already been signed by the undersigned. Moreover, lest there be any question at the time that the Complaint and Election for Jury Trial was signed by the undersigned and filed with the Circuit Court . . . the undersigned was a member of the Maryland Bar . . . .
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> The undersigned eventually received from the Clerk's Office in the mail, subsequent to August 10 (sic), the original Complaint and Election for Jury Trial (along with the check for the filing fee that had simultaneously been filed with that Complaint) that the undersigned had filed on August 10 (sic), 2010. The undersigned, subsequent to having received that document from the Clerk's Office, then personally hand carried that document back to the Clerk's Office on or about September 23, 2010.[4]

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[3]Based upon what is stamped on the Complaint and what Kim's counsel told the motions judge, it is clear that the affiant meant August 11, 2010 not August 10, 2010.

[4]In its brief, Heatherwood includes a footnote that reads:

> Although Kim's now-disbarred former attorney, Barry S. Brown, submitted an affidavit with Kim's motion which claims Mr Brown "filed" the complaint on

(continued...)

The motion was supported by a memorandum that accurately cited numerous decisions from this Court and the Court of Appeals that, except for one narrow exception, hold that a circuit court clerk has no discretion to reject a pleading filed with the clerk's office. The narrow exception, which is not here applicable, requires the clerk to reject any pleading that is required to have a certificate of service but does not contain one. *See* Md. Rule 1-323 and *Lovero v. DaSilva*, 200 Md. App. 433, 443-44 (2011).

Heatherwood's attorney filed an opposition to the February 9 motion in which defense counsel first asserted that Kim had no right to a "new trial" because no trial had been held in the first place. Second, counsel argued that even if there had been a trial, the motion was too late because it was not filed within ten days of the entry of final judgment as required by Md. Rule 2-533. In regards to the motion to correct docket entries, Heatherwood asserted that nothing submitted by Kim showed that the complaint was filed, as opposed to having been received by the clerk, on August 11, 2010.

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[4](...continued)
August 11, 2010 only to have it returned, this affidavit is not properly signed or dated and does not comply with the generally accepted rules for affidavits. *See e.g.*, Md. Rule 2-501(c). (*See also* Kim's App. Br. at 15.).

We have reviewed the file and found that Brown's affidavit was signed by him and dated February 9, 2012. We are unable to determine what Heatherwood means when it says that the affidavit did not "comply with the generally accepted rules for affidavits." But assuming *arguendo* that Heatherwood perceives some defect in the form of the affidavit, it is too late to complain about that defect now because no such complaint was raised below. *See A.J. Decoster Co. v. Westinghouse Elec. Corp.*, 333 Md. 245, 263 (1994). (Where the issue of the sufficiency of an affidavit is not raised in the trial court, an appellate court will not consider defects in form on appeal).

The motions judge denied the February 9, 2012 motion by an order docketed on May 7, 2012. He gave no explanation.

IV. Analysis

A. Our error in narrowing the issue that could be presented.

The November 13, 2012 order, in which we narrowed the issues that could be presented, was based on our belief that a final order, within the meaning of Md. Rule 2-601(a), was docketed on January 18, 2012. If that date was accurate, Kim would only have had until Monday, January 29, 2012, to file his post-judgment motion if he wished to stop the 30 day appeal clock from running. *See Pickett v. Noba, Inc.,* 114 Md. App. 552, 556-57 (1999). *See also* Md. Rules 2-532, 2-533 and 2-534. But, as will be explained, January 18, 2012 was not the date of the final order.

Maryland Rule 2-601(a) reads, in part: "Upon a verdict of a jury or a decision by the court allowing recovery only of costs or a specified amount of money or denying all relief, the clerk shall forthwith prepare, sign, and enter the judgment, unless the court orders otherwise." (Emphasis added). The judgment entered on February 10, 2012, by the clerk of the court, was in full compliance with the portion of Rule 2-601(a) just quoted. The sentence of Md. Rule 2-601(a) following the one quoted above reads: "Upon a verdict by a jury or a decision by the Court granting other relief, the court shall promptly review the form of the judgment presented and, if approved, sign it and the clerk shall forthwith enter the judgment as approved and signed." (Emphasis added). In this case, the motions judge signed an order on January 10, 2012 that was docketed on January 18, 2012 but that order did not grant "other

relief" within the meaning of Rule 2-601(a). Heatherwood evidently believed [when it filed its motion to dismiss this appeal] that the January 18 order was final. Heatherwood was wrong in this regard. In Maryland Rules Commentary, by Niemeyer & Schuett (Third edition) p. 489, the authors explain why, viz:

> The Rule [2-601(a)] distinguishes the circumstances under which the clerk enters the judgment document and under which the court does so. It is the clerk, in the absence of a court order to the contrary, who prepares, signs, and enters the separate document when the verdict following a jury trial or the court's decision (whether on motion or following a court trial) grants a money judgment only, denies all relief, or is for costs only. In all other circumstances, the parties, the clerk, or the court itself may prepare the form of the judgment, but the court must approve and sign the separate document in these circumstances. In either event, as required by Rule 2-602, the document must reflect resolution of all claims among all parties.

(Emphasis added).

Here, the motions judge "did not order otherwise," i.e., he did not direct the clerk to deviate from the requirements set forth in Md. Rule 2-601(a). Therefore, the judgment signed by Mr. Conaway, the clerk of the court, that was docketed on February 10, 2012, constituted the final judgment because the order followed a court decision (ruling on a motion) that denied all relief except for an award of costs.

As will be shown *infra.*, although the February 9, 2012 motion was captioned, in part, as a "Motion for New Trial" it should have been treated substantively as a motion to revise judgment, pursuant to Md. Rule 2-535(a). Subsection (a) of Rule 2-535 governing motions to revise a judgment reads, in material part, "[a] motion filed after the announcement or signing by the trial court of a judgment or before the return of a verdict but before the entry

of a judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket." (Emphasis added). The word "judgment" means "any order of court final in its nature entered pursuant to these rules." *See* Md. Rule 1-202(o). Kim filed his February 9 motion one day before the docketing of the clerk's final order. Therefore, the February 9 motion to revise judgment should have been treated as if it were filed on February 10, 2012 - but immediately after the final judgment docketed by the clerk. If the February 9 motion had been so treated, that motion would have stopped the "30 day clock" [for filing an appeal] from running until May 7, 2012, which was the date of docketing the court's order denying the February 9, 2012 motions. *See Pickett v. Noba, Inc.*, 114 Md. App. at 556. Kim filed his appeal within 30 days of May 7, 2012.

As can be seen, we erred when we restricted the issues that Kim could raise in this appeal. Ordinarily, discovering such an error would require us to withhold a ruling in this case so that Kim could file a brief raising the issue of whether the court erred in granting the motion to dismiss on statute of limitations grounds. And, based on the materials thus far submitted, it would appear that the motions judge did err when he dismissed the case because, by looking at the four corners of the complaint, it is impossible to say when Kim's cause of action accrued. *See* note 1, *supra*. Fortunately, however, further briefing is unnecessary because we shall hold that Kim is entitled to reversal on a ground that the parties did brief.

B. Should the trial judge have granted Kim's February 9 motion?

Kim's main argument in this appeal is that the motions judge erred in denying his post judgment motions because the final judgment entered was based on a mistake by the clerk of

the circuit court. In support of that argument, Kim relies on the affidavit filed by his circuit court counsel and on the legal authority he cited in his February 9 motion.[5]

Heatherwood argues, preliminarily, that Kim's February 9 motion was not a motion to revise judgment but was, instead, a motion for new trial. We disagree. In *Corapcioglu v. Roosevelt*, 170 Md. App. 572, 590-591 (2006) we said:

> It is well established in Maryland law that a court is to treat a paper filed by a party according to its substance, and not by its label. *See, e.g. Alitalia Linee Aeree Italiane v. Tornillo*, 320 Md. 192, 195, 577 A.2d 34 (1990). ("Ordinarily, 'magic words' are not essential to successful pleadings in Maryland. Courts . . . are expected to look at the substance of the allegations before them, not merely at labels or conclusory averments."); *Gluckstern v. Sutton*, 319 Md. 634, 650-51, 574 A.2d 898 (1990) (treating document labeled as "memorandum" as a motion to revise); *Higgins v. Barnes*, 310 Md. 532, 535 n. 1, 530 A.2d 724 (1987). (noting that "our concern is with the nature of the *issues* legitimately raised by the pleadings, and not with the labels given to the pleadings"); *Frederick County Bd. of Comm'rs v. Sautter,* 123 Md. App. 440, 451-52, 718 A.2d 685 (1998) (observing that, in court filings, substance is more important than form); *see also Esteps Elec. & Petroleum Co. v. Sager,* 67 Md. App. 649, 652, 508 A.2d 1032 (1986), and *Flying "A" Serv. Station v. Jordan,* 17 Md. App. 477, 482, 302 A.2d 650 (1973) (both cases treating motions for reconsideration as motions for rehearing).

(Emphasis added).

Read in its entirety, it is clear that the relief Kim requested in his February 9 motion was for the court to revise its judgment pursuant to Md. Rule 2-535. That last mentioned rule was the one Kim cited (not the rule governing new trials) in his post judgment motion and movant asked that the judgment be corrected. Moreover, in support of his motion, Kim

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[5]The attorneys who represent Kim on this appeal are not the same, or from the same law firm, as the attorney who represented Kim in the circuit court.

emphasized our holding in *Lovero v. DaSilva*, *supra*, 200 Md. App. at 442-446, where we spelled out, in detail, the rule that ordinarily the clerk has a duty to file any pleading that he or she receives. In *Lovero* 200 Md. App. at 443-44, we said:

> Corresponding to the delivery of a pleading or paper to the clerk is the duty of the clerk to record any such pleading or paper as filed and entered on the docket of the case in question. *See* Md. Code (1974, 2006 Repl. Vol.), §2-201(a)(3) of the Courts & Judicial Proceedings Article ("C.J."). This duty has been classified as "ministerial" and described as follows:
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> Except as otherwise expressly provided by law, therefore, the clerk has no discretion in the matter and no right to make a judicial determination of whether the paper complies with the Rules or ought to be filed. If the paper has not been presented timely or if it suffers from some other deficiency, it is subject to being stricken by the court, usually upon motion of a party objecting to the paper, but so long as it is properly presented, the clerk must accept and file it.
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> *Dir. of Fin. V. Harris*, 90 Md. App. 506, 513, 602 A.2d 191 (1992).
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> Examples of deficiencies in a pleading or paper that have been held *not* to prevent the acceptance and filing thereof by the clerk include the lack of a proper caption on an original document, *Cherry*, 306 Md. at 92, 507 A.2d 613, the incorrect name of the court and docket number, *Cave*, 190 Md. App. at 75-76, 988 A.2d 1, and a certificate of service that failed to comply with Rule 1-321, *Harris*, 90 Md. App. at 514, 602 A.2d 191 (*pro se* party stated that he served his motion on his mother instead of on the City Solicitor). In sum, "[u]nder most circumstances, [ ] regardless of how defective or deficient the pleading or paper is, the clerk may not reject it . . ., but rather should leave it to the court and the parties to determine the sanction for the defect or deficiency." Paul V. Niemeyer, Linda M. Schuett, John A. Lunch, Jr., & Richard W. Bourne, *Maryland Rules Commentary* 48-49 (3d ed. 2003) (*"Maryland Rules Commentary"*).
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> The only exception to the duty of the clerk to file a pleading or paper, regardless of a defect or deficiency, is the requirement of Rule 1-323 that the "clerk shall not accept for filing" a pleading or paper requiring service that does not contain "an admission or waiver of service or a signed certificate showing the date and manner of making service." *See Harris*, 90 Md. App. at 513, 602 A.2d 191 (stating that "[t]he only exception . . . is the direction in Md. Rule 1-

323 not to accept a paper that lacks an admission or waiver of service or a certificate showing the date and manner of service").

Md. Rule 2-535, reads in its entirety:

> (a) **Generally**. On motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534. A motion filed after the announcement or signing by the trial court of a judgment or the return of a verdict but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry of the docket.
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> (b) **Fraud, Mistake, Irregularity**. On motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity.
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> (c) **Newly-Discovered Evidence.** On motion of any party filed within 30 days after entry of judgment, the court may grant a new trial on the ground of newly-discovered evidence that could not have been discovered by due diligence in time to move for a new trial pursuant to Rule 2-533.
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> (d) **Clerical Mistakes**. Clerical mistakes in judgments, orders, or other parts of the record may be corrected by the court at any time on its own initiative, or on motion of any party after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed by the appellate court, and thereafter with leave of the appellate court.

It is well established that when a motion is filed to revise an unenrolled judgment pursuant to subsection (a) of Md. Rule 2-535, "the trial court possesses an extremely broad power of revision and must exercise its discretion liberally 'lest technicality triumph over justice.'" *Hamilton v. Hamilton*, 242 Md. 240, 243 (1966) (quoting *Eshelman Motors Corp. v. Scheftel*, 231 Md. 300, 301 (1963)). When the February 9 motion was filed, the judgment of dismissal was unenrolled. Under such circumstances, "[t]he real question is whether justice

has not been done, and our review of the exercise of a court's discretion will be guided by that concept." *Wormwood v. Batching Systems, Inc,*, 124 Md. App. 695, 700 (1999).

In this case, it is clear that if what Kim's counsel said in his affidavit was true, the clerk had no right to refuse to file the complaint on the date he received it. Heatherwood, in its opposition filed below, did not challenge the truthfulness of the assertions set forth in the affidavit. Therefore, the clerk's decision to not file the complaint on August 11, 2010 was improper.[6] *See Lovero, supra*, 200 Md. App. at 443. This is important because at the hearing held on the morning of the trial, the motions judge made it clear that in his view it did not matter whether or not the clerk was required to file the complaint. It was enough that the complaint had not been docketed.

Although Heatherwood's counsel, in his opposition to Kim's post trial motion, did not contend that the affidavit was untruthful, Heatherwood now makes the following argument:

> . . . Kim has not established that the trial court judge had any obligation to accept those allegations [contained in the affidavit of Kim's counsel] for purposes of reconsidering the judgment. To the contrary, "[i]t is firmly established" by this Court that the broad discretionary power prescribed under Rule 2-535(b) "should be exercised only when the movant shows a reasonable indication that there is merit in his cause." *Kaplan v. Bach*, 36 Md. App. 152, 158, 373 A.2d 71, 76 (1977). Moreover, and as noted above, this is not merely a situation where the trial court was asked to correct a clerical error or typographical error in the judgment; rather, Kim was demanding that the trial

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[6]We recognize that the affidavit by Kim's counsel sets the date of filing as August 10, 2010. But as mentioned, (*see* note 3 *supra*) the August 10 date was a typographical error and the affidavit should have read "August 11, 2010."

court reverse its entire judgment - a judgment that was based on the four corners of the pleadings.

It is true that when he dismissed the case the motions judge stated that he based his decision "on the four corners of the complaint." Contrary to Heatherwood's argument, however, circuit court judges do not have "discretion" to disregard an affidavit, when that affidavit is uncontradicted and relevant.[7] We hold that the motions judge was required to consider Kim's counsel's affidavit, which clearly indicated that there was merit to Kim's position that the complaint had been received on August 11, 2010, but was improperly rejected by the clerk. Moreover, the statements in the affidavit as to what happened in the clerk's office were corroborated by the fact that the complaint, in the court file, had a stamp on it showing that it was "received on August 11, 2010." No rule, or judicial precedent, allows a motions judge to disregard an uncontradicted affidavit that relates to a material issue.

The cases Heatherwood cites in its brief in regard to Md. Rule 2-535(b) are inapposite. Subsection (b) of Rule 2-535 concerns motions filed more than 30 days after the judgment has become enrolled. Here, Kim's post-trial motion was filed within 30 days of judgment. Therefore, Md. Rule 2-535(a), which is much more liberal than Rule 2-535(b), controls. *See Wormwood*, 124 Md. App. at 700 ("the real question [when reviewing the denial of Md. Rule 2-535(a) motion] is whether justice has not been done").

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[7]If Heatherwood disagreed with any assertion in the affidavit it should have filed a counter-affidavit. *See* Md. Rule 2-311(d).

In *Wormwood, supra*, we said that in determining whether justice had been done, three factors should be considered: (1) nature of the error, (2) the diligence of the parties, and (3) the surrounding facts and circumstances. *Id.* at 700. Here it is difficult to determine exactly why the court denied Kim's motion but, based on what the judge said at the original hearing, he apparently held the view that it didn't matter when the clerk received the complaint, what mattered was when it was filed. But as Kim pointed out in his memorandum of law in support of the February 9 motion, the words "received" and "filed" are synonymous, i.e., a pleading is deemed filed when it is received by the court. This was explained in *Bond v. Slovin*, 157 Md. App. 340, 351-52 (2004):

> The date that a pleading or paper is filed is the date that the clerk receives it. . . . PAUL V. NIEMEYER & LINDA M. SCHUETT, MARYLAND RULES COMMENTARY 47 (3d.ed.2003). A pleading or paper is filed by *actual delivery* to the clerk. . . . *Id.* Rule 8-201 does not provide that failure to pay the filing fee prohibits a Notice of Appeal from being filed. We therefore hold that, except for notices of appeal that fail to comply with the certificate of service requirement of Md. Rule 1-323, the notice of appeal is filed on the date that the clerk receives the notice, not the date on which the clerk receives the filing fee.

(Footnote omitted) (Internal quotation marks omitted). *See also Cherry v. Bros.*, 306 Md. 84, 92 (1986) and *Levy v. Glen Falls Indem., Co.*, 210 Md. 265, 273 (1956).

The failure of the clerk to retain the complaint and to note on the docket entries that it had been filed on August 11, 2010 constituted an irregularity, which the court, in *Early v. Early*, 338 Md. 639, 652 (1995), defined as a "failure to follow required process or

procedure." If the clerk had retained the complaint and docketed it (as he was obliged to do) there would have been no basis to even argue that limitations barred this action. The court's error in failing to recognize and remedy this irregularity was a serious one.

The second *Wormwood* factor (diligence of the parties) also favors Kim. Heatherwood did not file the motion to dismiss until the morning of trial (January 9, 2012). That dispositive motion should have been filed on or before November 23, 2011. Heatherwood's delay appears to have been an attempt to obtain a tactical advantage over Kim by putting the latter in a position where it would be difficult to digest and research the points Heatherwood raised prior to oral argument. Kim, unlike Heatherwood, was diligent. His counsel, with only approximately two hours notice that Heatherwood's counsel was going to argue that a complaint was not filed on the same date it was received, produced for the court a witness (Mr. Gillis) who was prepared to explain why the complaint was stamped "received" on August 11, 2010 but was not docketed until September 23, 2012.

The third *Wormwood* factor (surrounding facts and circumstances) favor reversal. As previously explained, the February 9 motion should have been treated as a motion to revise judgment pursuant to Md. Rule 2-535(a). When considering such a motion, the court was required to exercise its discretion liberally to ensure that "technicality [does not] triumph over justice." *Hamilton, supra*, 242 Md. at 243. Nothing in this record indicates that the court's discretion was exercised liberally. Instead, the motion was most probably denied based on

the reasons set forth by Heatherwood in its opposition to Kim's February 9 motion. Those reasons were uniformly non-meritorious.

For the above reasons, we hold that the motions judge abused his discretion when he denied Kim's motion to revise judgment.

C. Other Matters

As mentioned earlier, Kim asked, in his post trial motion, for the court to correct the docket entries to show the correct date that the complaint was filed. The motions judge denied that part of the post judgment motion. Because of our November 13, 2012 order, the issue of whether the court should have granted that part of the motion, strictly speaking, is not before us. Nevertheless, in light of our holding that the motions judge erred in failing to revise the judgment by denying the motion to dismiss, the issue will likely come up again upon remand. For the guidance of the circuit court, we point out that the applicable law is set forth in *Maryland, Del. & Va. Rwy. Co. v. Johnson*, 129 Md. 412, 416 (1916):

> In the case of *Greff v. Fickey*, 30 Md. 77, our predecessors said: "If he (the judge) is satisfied either from his own knowledge of what had actually occurred in the progress of the cause, or from evidence adduced, that the docket entries made by the clerk were erroneous and incomplete, it was within his power, and his plain duty, to have them corrected, so that a full, *true* and perfect transcript of the whole proceedings as they actually occurred in the progress of the cause might be sent up in obedience to the writ."
>
> To make the Record speak the truth and conform to the facts is a common law power, and is incident to all courts of record, and essential to their efficient existence. This power may be exercised at any time, even if the

> Record has been transmitted on appeal to a superior court and the appeal is there pending. *Hays v. P., W. & B. R. R. Co.*, 99th Md. 420; 17th *Enc. Pl. and Pr., 922; Waters v. Engle,* 53 Md. 179. But in the exercise of such power the Court is authorized to make only such corrections as will make the record conform to the actual facts occurring in the progress of the cause, or in other words, make the Record speak the truth. It cannot so change the Record as to make it inconsistent with the facts, or make it state what is not true.

Upon remand, the court should correct the docket entries to show that the complaint was filed on August 11, 2010, unless Heatherwood can produce competent evidence showing the complaint was not, in fact, received by the Clerk of the Circuit Court on that date.

JUDGMENT DISMISSING COMPLAINT REVERSED; CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR FURTHER PROCEEDINGS IN CONFORMITY WITH THE VIEWS EXPRESSED IN THIS OPINION. COSTS TO BE PAID BY APPELLEES.