UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0372

September Term, 2014

MARTINE C. PREPETIT-FOSTER

v.

BURT B. FOSTER, JR.

Zarnoch,
Woodward,
Leahy,

JJ.

Opinion by Leahy, J.

Filed: September 10, 2015

After 16 years of marriage, Appellant Martine Prepetit-Foster and Appellee Burt Foster separated in 2008. On July 27, 2009, the Circuit Court for Anne Arundel County entered an order memorializing a settlement agreement in which the parties had divided their marital property, including Mr. Foster's retirement accounts, and resolved all economic claims against each other.

After the entry of absolute divorce in 2010, while attempting to enforce a retirement benefits court order ("RBCO") to obtain her portion of the retirement in 2013, Ms. Prepetit-Foster became aware of a second retirement account that Mr. Foster had not disclosed. She filed a motion pursuant to Maryland Rule 2-535(b) alleging fraud as grounds and asking the circuit court to revise the July 27th order to include Mr. Foster's second retirement account. After holding a hearing on February 25, 2014, the circuit court denied Ms. Prepetit-Foster's motion, stating that any fraud Mr. Foster may have committed was intrinsic fraud, thus precluding relief under Rule 2-535(b). Ms. Prepetit-Foster filed a motion for reconsideration on March 21, 2014, (entered March 25, 2014). After opposition from Mr. Foster, the court denied on April 14, 2014 (entered on April 17, 2014), reaffirming its earlier findings and supplementing them with a finding that Ms. Prepetit-Foster had not proved actual fraud. Ms. Prepetit-Foster appealed and presents several questions for our review, which we have rephrased as follows:

I. Did the circuit court err as a matter of law in denying the motion for reconsideration by requiring actual rather than constructive fraud as necessary to modify a judgment?

II. Did the circuit court err as a matter of law in denying the motion for reconsideration and determining the fraud by Mr. Foster to be intrinsic?

We cannot conclude, based on the record before us, that the court abused its discretion in denying Ms. Prepetit-Foster's motion to reconsider its pervious order dismissing her motion to revise judgment.

BACKGROUND

Ms. Prepetit-Foster and Mr. Foster married in 1992 and separated in 2008. After the separation, Mr. Foster initially paid the mortgage and other expenses for Ms. Prepetit-Foster and their two minor children. On July 31, 2008, Ms. Prepetit-Foster filed a complaint for limited divorce and a request for an emergency hearing against Mr. Foster in the Circuit Court for Anne Arundel County, seeking expenses for her and the children due to the substantial disparity in their income. In response, Mr. Foster alleged that he had already provided financial support including, but not limited to, payment of the mortgage on the marital home.

Ms. Prepetit-Foster sent interrogatories to Mr. Foster on August 29, 2008. Interrogatory 24 asked Mr. Foster to describe his retirement accounts: "If you have any interest in any type of pension plan, retirement plan, or profit sharing plan, identify the plan, the amount of your contributions, and the value of your interest in the plan." On December 5, 2008, Mr. Foster, through his counsel, responded to the interrogatories, stating: "I have a pension plan through the federal government; value is approximately $100,000.00 and varies depending [on] the stock market. I contribute $424.18 to this

pension plan every pay period." Mr. Foster "affirm[ed] under penalties of perjury that the aforegoing Defendant's Answer[s] to Interrogatories [were] true and correct."

After the parties appeared before a master on January 8, 2009, the court entered a *pendente lite* order reflecting an agreement between the parties as to child support, the children's tuition, expenses for the home, division of a 2008 tax refund, and payment of Ms. Prepetit-Foster's automobile loan.

On May 22, 2009, Ms. Prepetit-Foster filed an amended complaint for absolute divorce. Mr. Foster answered the amended complaint on June 29, 2009, contesting Ms. Prepetit-Foster's allegations and requesting that the complaint be denied. On June 15, 2009, the parties notified the court that they had reached a settlement and would submit a consent order within 21 days; they requested that the court dismiss the divorce action while retaining the right to refile when the divorce became ripe without incurring additional filing fees. During their settlement negotiations, the parties agreed that Ms. Prepetit-Foster would receive one-half of the marital share of any pension, 401K, or retirement plan owned by Mr. Foster. On June 25, 2009, Ms. Hogan, Mr. Foster's attorney, sent Ms. Rachel Stafford, Ms. Prepetit-Foster's attorney, via e-mail, a draft consent order that included the following provision, among others:

> Ms. Prepetit-Foster will be entitled to one-half of the marital share of any pension, 401K, or retirement plan owned by Mr. Foster pursuant to a[] Qualified Domestic Relations Order.[1] The value of any defined

[1] The parties use the term "Qualified Domestic Relations Order" or "QDRO" when discussing Mr. Foster's retirement benefits that are actually subject to an RBCO. "[A]lthough the concept and acronym [of QDROs] are creatures of ERISA, the label 'QDRO' may have achieved a broader meaning. . . . [T]he term has sometimes leapt the (Continued…)

> contribution plan shall be determined as of the date of the divorce. Any pension shall be shared on an 'if, as and when' basis pursuant to a Bangs formula.[2]

On July 17, 2009, Ms. Stafford responded via e-mail with several substantive changes, including a clarification that Mr. Foster's retirement plan was a Thrift Savings Plan ("TSP") and to provide for distributions from such a plan. In the same e-mail, Ms. Stafford asked Ms. Hogan to "[p]lease advise if Mr. Foster has any other retirement/defined benefit plans." Ms. Hogan responded on July 22nd, attaching a revised draft of the order, which stated:

> 13. Retirement/Pension. Martine C. Prepetit-Foster will be entitled to one-half of the marital share of any Thrift Savings Plan or defined contribution plan owned by Burt B. Foster pursuant to a Retirement Benefits Court Order. The value of any Thrift Savings Plan or defined contribution plan shall be determined as of the date of the divorce. The Administrator of any Thrift Savings Plan shall pay Martine C. Prepetit-Foster's share as a single lump sum payment directly to Martine C. Prepetit-Foster as soon as administratively feasible or by direct rollover to an Individual Retirement Account on Martine C. Prepetit-Foster's behalf as she shall direct. Should Burt B.[ ]Foster die prior to complete distribution of Martine C. Prepetit-Foster's share, then she shall receive death benefits equal to such unpaid portion of Burt B. Foster's share, if any. Terms stated in [this] paragraph . . . are subject to approval by the Plan Administrator of the Thrift Savings Plan.

Ms. Hogan did not respond indicating that Mr. Foster had any other retirement accounts.

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boundaries of its formal meaning to encompass generically orders in divorces that distribute retirement plan benefits." *Robinette v. Hunsecker,* 439 Md. 243, 247 (2014). The term, "QDRO," has thus become genericized, similar to using the term, "Xerox copy" to describe a photocopy, regardless of the brand of the photocopy machine or to that of conducting a "Google search" regardless of the search engine used. *Id.*

[2] The "*Bangs* formula" is a formula for the division of pension payments established in *Bangs v. Bangs*, 59 Md. App. 350 (1984).

The circuit court signed the amended version of the parties' consent order on July 27, 2009. The order contained the above provision, and it did not provide for a distribution from any other retirement plans other than a defined contribution plan or the Thrift Savings Plan.

After the parties had been separated for two years, Mr. Foster filed a counter-complaint for absolute divorce on February 23, 2010. Ms. Prepetit-Foster answered the counter-complaint on March 16, 2010, and the parties thereafter engaged in settlement discussions. On July 7, 2010, the court entered a consent order representing agreement between the parties on all outstanding child-related issues. That same day, the court also entered the judgment of absolute divorce, which stated that "all terms and conditions of the Consent Order dated July 27, 2009 . . . remain in full force and effect." After the divorce, the parties continued to litigate terms of the order and other child-related issues not relevant to the issues presented in this appeal.[3]

On January 17, 2012, the court issued an RBCO contemplated by the parties' separation agreement as embodied in the 2009 consent order, to "effect the payment of [one half of] the marital share of any Thrift Savings Plan or defined contribution plan" owned by Mr. Foster to Ms. Prepetit-Foster.[4] Ms. Prepetit-Foster maintains that it was

[3] On June 27, 2011, the parties participated in a hearing before a master on the subject of modification of child support. At that hearing, Mr. Foster submitted a printout of his USPS earnings statement, which showed two retirement accounts.

[4] This initial RBCO was rejected by the TSP administrator in a letter dated June 18, 2012, because the parties failed to define the term "marital share," so the administrator could not release the funds. In a letter dated April 1, 2013, counsel for Ms.
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only when she attempted to enforce the consent order and obtain her share of the funds from Mr. Foster's thrift savings retirement plan, that she discovered that Mr. Foster also had a Federal Employees Retirement System ("FERS") benefit plan.[5] On April 1, 2013, counsel for Ms. Prepetit-Foster wrote a letter to Mr. Foster's counsel, seeking Mr. Foster's signature on an RBCO that assigned one half of the marital share of Mr. Foster's FERS plan to Ms. Prepetit-Foster. New counsel retained by Mr. Foster responded to the letter on May 28, 2013, stating that she would review the matter.

The parties evidently continued to disagree on the issue, because the record reflects that on November 15, 2013, Ms. Prepetit-Foster filed a motion to enforce judgment, or in the alternative, modification and clarification of judgment of divorce to clarify that Ms. Prepetit-Foster was entitled to half of the marital share of Mr. Foster's FERS plan.[6] In the motion, filed pursuant to Maryland Rule 2-535(b), Ms. Prepetit-Foster asserted fraud as the ground for modifying judgment. On November 18, 2013, Mr. Foster filed an opposition.

The circuit court held a hearing on the matter on February 21, 2014. During the hearing, Ms. Prepetit-Foster called as a witness Ms. Rachel Stafford, the attorney who

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Prepetit-Foster proposed language for an amended RBCO that addressed this problem. Mr. Foster does not dispute Ms. Prepetit-Foster's right to obtain her share of the TSP.

[5] The amount held by the FERS pension plan in Mr. Foster's name is not readily available in the record.

[6] In this motion, Ms. Prepetit-Foster also referred to disputes with Mr. Foster about other aspects of the consent order not relevant here.

represented her during the divorce. The court admitted Ms. Prepetit-Foster's interrogatories and Mr. Foster's answers filed in 2008 (indicating that he had only one retirement account—the Thrift Savings Plan) into evidence. Both Ms. Stafford and Mr. Foster testified that Mr. Foster did not supplement these answers.

Mr. Foster testified that in 2008, both the TSP and the FERS retirement accounts were benefits received from his employment with the federal government. However, both Ms. Stafford and Ms. Prepetit-Foster claim they did not know about any other retirement plans that Mr. Foster received, other than the one he had mentioned in his answers to interrogatories.

Mr. Foster testified that he gave his attorney, Ms. Hogan, a federal employment retirement benefits handbook, which explained the various federal retirement plans, including FERS and TSP, to produce in response to Ms. Prepetit-Foster's discovery requests. During cross-examination, Ms. Prepetit-Foster's attorney, Ms. Stafford, stated that she could not recall if the benefits handbook had been produced in discovery in 2008. Mr. Foster also stated that he produced his paystubs, which indicated that, among other deductions, the payroll department deducted from his gross pay during an 80-hour work period $424.18 for "TSP09" and $66.45 for "RETIRE 9"—the FERS account.

After the close of evidence, Mr. Foster moved to dismiss Ms. Prepetit-Foster's motion to modify judgment.[7] He argued that the settlement negotiations could not be

[7] Even though Mr. Foster labeled this motion a motion to dismiss, it was ultimately treated as a motion for summary judgment. *See* Md. Rule 2-501; Md. Rule 2-322 (If "matters outside the pleading are presented to and not excluded by the court, the (Continued…)

considered by the court pursuant to the parol evidence rule and that Ms. Prepetit-Foster did not prove her case in fraud, i.e. that the evidence did not show that Mr. Foster had the specific intent to defraud. Mr. Foster further argued that because he produced his paystubs and the FERS benefit booklet, he had in fact given Ms. Prepetit-Foster documents showing that his retirement benefits included the FERS account. Ms. Prepetit-Foster argued that, taking the evidence in the light most favorable to her as the non-moving party, she proved extrinsic fraud, because Mr. Foster's conduct prevented her from learning of the FERS plan.

The court, ruling from the bench, did not make a finding of fact concerning Mr. Foster's fraudulent conduct. Looking at the facts in the light most favorable to Ms. Prepetit-Foster, the Court assumed that fraud took place. Instead, relying on *Hresko v. Hresko*, 83 Md. App. 228, 232 (1990), the court ruled that, as a matter of law, any fraud that took place constituted intrinsic fraud and, therefore, could not be used to modify an enrolled judgment (entered February 25, 2014). Assuming fraud was committed, the court found that it was intrinsic because it occurred during the discovery process and did not prevent the parties from having the opportunity for a trial.

Ms. Prepetit-Foster filed a motion to reconsider on March 21, 2014, (entered March 25, 2014), in which she argued that Mr. Foster's omission constituted constructive fraud and that that fraud was extrinsic to the case. Mr. Foster filed his opposition to the

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motion shall be treated as one for summary judgment and disposed of as provided in Rule 2-501[.]").

motion to reconsider on April 7, 2014, and the court denied the motion on April 11, 2014 (entered on April 17, 2014). The order denying reconsideration, contained a handwritten notation:

> Although this court recognizes there may be controversy over the intrinsic/extrinsic distinction in the context of pre-trial discovery elsewhere in the U.S. . . . Maryland's closest precedent remains *Hresko v. Hresko*, 83 Md. App. 228, 232 (1990) [] here, Plaintiff failed to meet her burden to prove actual fraud rather than mere negligence.

Ms. Prepetit-Foster appealed on May 5, 2014.

DISCUSSION

Ms. Prepetit-Foster argues that Mr. Foster committed actual or constructive fraud by withholding the existence of his FERS pension plan during discovery. This fraud, Ms. Prepetit-Foster continues, was extrinsic, and thus serves as a basis for the court to modify the consent order to allow Ms. Prepetit-Foster to receive her share of the plan. Specifically, Ms. Prepetit-Foster asserts that the circuit court erred by incorrectly applying the elements of constructive fraud and by finding that the fraud was intrinsic.

Mr. Foster argues that Ms. Prepetit-Foster failed to prove fraud and that the appeal should be dismissed because Ms. Prepetit-Foster did not request a new trial within ten days of the court's oral ruling finding against her. We note that Ms. Prepetit-Foster was under no obligation to file a motion for a new trial; however, we do take time to discuss the issues presented by the procedural posture presented here: an appeal from the denial of a motion to reconsider the dismissal of a motion to revise an enrolled judgment.

Pursuant to Md. Rule 8-202(a), a notice of appeal must be "filed within 30 days of the entry of the judgment or order from which the appeal is taken." However, a motion

invoking the trial court's revisory power, such as Ms. Prepetit-Foster's motion to reconsider, will not toll the time for filing an appeal unless the motion is filed within ten days of the judgment or order. *Furda v. State*, 193 Md. App. 371, 377 n.1 (2010); *see Unnamed Att'y v. Att'y Grievance Comm'n,* 303 Md. 473, 486 (1985). Thus, "[w]hen a revisory motion is filed beyond the ten-day period, but within thirty days, an appeal noted within thirty days after the court resolves the revisory motion addresses only the issues generated by the revisory motion." *Furda*, 193 Md. App. at 377, n.1. Because Ms. Prepetit-Foster filed her motion to reconsider and revise judgment on March 21, 2014, more than ten days after the court entered the underlying order, the time for filing her appeal from the underlying order was not tolled. As a result, we only review the court's denial of Ms. Prepetit-Foster's motion to reconsider and revise judgment.[8] *See id.*

We review the denial of a motion for reconsideration for abuse of discretion. *Wilson-X v. Dep't of Human Res.*, 403 Md. 667, 675 (2008). "[T]rial judges do not have discretion to apply inappropriate legal standards, even when making decisions that are regarded as discretionary in nature." *Id.*; *see Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 433 (2007) (noting that "a failure to consider the proper legal standard in reaching a

[8] Mr. Foster contends that Ms. Prepetit-Foster was "time barred" from filing this appeal because it was filed more than ten days the entry of the court's judgment. However, Maryland Rule 2-535 allows a court to exercise its revisory power and control over the judgment if a motion to reconsider is filed within *30 days* of the entry of judgment. Indeed, Ms. Prepetit-Foster filed her motion to reconsider pursuant Maryland Rule 2-535, on March 21, 2014 (entered on March 25, 2014), within the 30-day requirement of the rule. In other words, the effect of filing a motion for reconsideration outside of the ten-day period is that appellate review of the underlying order is not preserved, but the party is not time-barred from appealing the order on reconsideration.

decision constitutes an abuse of discretion" (citations omitted)). The Court of Appeals observed that "[t]he relevance of an asserted legal error, of substantive law, procedural requirements, or fact-finding unsupported by substantial evidence, lies in whether there has been such an abuse." *Wilson-X*, 403 Md. at 675. Accordingly, we examine the law applied by the court in our review of its denial of Ms. Prepetit-Foster's motion to reconsider.

Maryland Rule 2-535(a) gives courts broad power to revise a judgment within 30 days of its entry. After that period, the judgment is considered to be enrolled, and then a court may only exercise its revisory power in the case of fraud, mistake, or irregularity.[9] Md. Rule 2-535(b). A "party moving to set aside the enrolled judgment must establish that he or she 'act[ed] with ordinary diligence and in good faith upon a meritorious cause of action or defense.'" *Thacker v. Hale*, 146 Md. App. 203, 217 (quoting *Platt v. Platt*, 302 Md. 9, 13 (1984)), *cert. denied,* 372 Md. 132 (2002).

"The existence of fraud, mistake, or irregularity must be shown by clear and convincing evidence. Maryland courts have narrowly defined and strictly applied the terms fraud, mistake, [and] irregularity, in order to ensure finality of judgments." *Pelletier v. Burson*, 213 Md. App. 284, 290 (2013) (quoting *Davis v. Attorney Gen.,* 187 Md. App. 110, 123-24 (2009); *Thacker*, 146 Md. App. at 217) (internal quotation marks omitted).

[9] Ms. Prepetit-Foster has not alleged an irregularity or a mistake.

I. Constructive Fraud

Ms. Prepetit-Foster filed her motion to modify pursuant to Rule 2-535(b), which allows a circuit court to revise a judgment in cases of fraud. Mr. Foster asserts that Ms. Prepetit-Foster did not meet her burden of proving *actual* fraud by clear and convincing evidence.[10] In its order denying Ms. Prepetit-Foster's motion to reconsider, the circuit court stated, "Plaintiff failed to meet her burden to prove actual fraud rather than mere negligence." Although we agree that the evidence does not support a finding of intentional misrepresentation by clear and convincing evidence; it *could* support a finding of constructive fraud.

Constructive fraud is similar in some respects to intentional fraud. Fraud is defined as "a knowing misrepresentation, concealment of material fact, or reckless misrepresentation made to induce another to act to his or her detriment." *Canaj, Inc. v. Baker & Div. Phase III, LLC*, 391 Md. 374, 421 (2006) (quoting Black's Law Dictionary 685 (8th ed. 2004)). The definition of constructive fraud is similar to the definition of intentional fraud in that they both contain "the inherent requirement that the

[10] At law, to prevail on a claim of fraudulent concealment of material facts, a plaintiff must prove by clear and convincing evidence that:

> (1) the defendant owed a duty to the plaintiff to disclose a material fact; (2) the defendant failed to disclose that fact; (3) the defendant intended to defraud or deceive the plaintiff; (4) the plaintiff took action in justifiable reliance on the concealment; and (5) the plaintiff suffered damages as a result of the defendant's concealment.

Gourdine v. Crews, 405 Md. 722, 758-59 n.13 (2008) (quoting *Green v. H & R Block, Inc.*, 355 Md. 488, 525 (1999)).

person or entity defrauded must have been in some way deceived or misled by the actions of the person or entity alleged to have committed the fraud." *Id.* These causes of action are distinct in one important respect: intentional fraud has a mens rea component whereby the plaintiff must prove that the defendant intended to defraud or deceive. Constructive fraud, on the other hand, does not have a specific mens rea component, i.e. constructive fraud does not demand proof of an intent to defraud.

Constructive fraud is an "[u]nintentional *deception* or misrepresentation that causes injury to another." *Canaj, Inc.*, 391 Md. at 421 (quoting Black's Law Dictionary 686 (8th ed. 2004)). To prove constructive fraud, a plaintiff "must show the 'breach of a legal or equitable duty which, irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests.'" *Maryland Envtl. Trust v. Gaynor*, 370 Md. 89, 97 (2002) (quoting *Ellerin v. Fairfax Savings,* 337 Md. 216, 236 n. 11 (1995)). A defendant may breach a legal duty by failing to meet an obligation required by statute or Maryland rule. *See Thompson v. UBS Fin. Servs., Inc.*, 443 Md. 47, 69 n.13 (2015) (noting that a claim for constructive fraud is cognizable where a statute or Maryland Rule required the defendant to meet an obligation for the plaintiff and the defendant failed to do so); *Jannenga v. Johnson*, 243 Md. 1, 4-5 (1966) (holding that defendant failed to perform a legal duty by not complying with the notice requirements in then Maryland Rule 105); *cf. Scheve v. McPherson*, 44 Md. App. 398, 408 (1979) (no constructive fraud where "there was no charge that the buyer failed to carry out any legal duty in connection with a foreclosure proceeding").

Constructive fraud is a cognizable claim in various types of equitable actions. *See Alleco Inc. v. Harry & Jeanette Weinberg Found., Inc.*, 340 Md. 176, 199 n.6 (1995) (noting that in equity, "fraud 'includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.'" (quoting 1 Story, *Equity Jurisprudence* § 263 (14th ed. 1918))). As divorce is an equitable action, Md. Code (1984, 2012 Repl. Vol., 2014 Supp.), Family Law Art. § 1-201(b), constructive fraud is a cognizable claim in the instant case.

By participating in discovery, Mr. Foster had a legal duty to answer Ms. Prepetit-Foster's interrogatories fully and truthfully. Maryland Rule 2-421(b) states in pertinent part: "The response shall answer each interrogatory separately and fully in writing under oath, or shall state fully the grounds for refusal to answer any interrogatory. . . . An answer shall include all information available to the party directly or through agents, representatives, or attorneys." Ms. Prepetit-Foster posits that in in omitting material information—the FERS account—Mr. Foster breached that legal duty.

Mr. Foster contends that he did not commit fraud because he, in fact, fully answered the interrogatory by producing documents in compliance with Maryland Rule 2-421(c). Maryland Rule 2-421(c) allows a party, under certain conditions, to specify business records that answer the interrogatory in lieu of providing a direct answer to the question.[11] A party may only invoke Rule 2-421(c) if "the burden of deriving or

[11] Maryland Rule 2-421(b), (c) states:

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ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served," and the responding party "has not already derived or ascertained the information requested." Md. Rule 2-421(c)(2), (3). Further, Rule 2-421(c) requires the specification of the business record to be sufficiently detailed "to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained."

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> **(b) Response.** The party to whom the interrogatories are directed shall serve a response within 30 days after service of the interrogatories or within 15 days after the date on which that party's initial pleading or motion is required, whichever is later. The response shall answer each interrogatory separately and fully in writing under oath, or shall state fully the grounds for refusal to answer any interrogatory. The response shall set forth each interrogatory followed by its answer. An answer shall include all information available to the party directly or through agents, representatives, or attorneys. The response shall be signed by the party making it.
>
> **(c) Option to Produce Business Records.** When (1) the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of those business records or a compilation, abstract, or summary of them, and (2) the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, and (3) the party upon whom the interrogatory has been served has not already derived or ascertained the information requested, it is a sufficient answer to the interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect the records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Ascertaining the existence of a pension plan, such as Mr. Foster's FERS account, is not a situation that warrants the production of business records in lieu of a direct answer to an interrogatory. *See* Advisory Committee Notes to the 1970 Amendment to Federal Rule of Civil Procedure 33(d) (from which Maryland Rule 2-421(c) was derived and stating that subsection (c) is applicable to "interrogatories which require a party to engage in burdensome or expensive research into his own business records in order to give an answer"). Mr. Foster's conduct runs afoul of the basic Rule 2-421(c) requirements that (1) he not be aware of the existence of the account, (2) the burden of deriving the information be the same for both parties, and (3) the record be sufficiently detailed to permit the questioning party to locate the information. Mr. Foster's production of his pay stubs and his federal benefits manual did not satisfy Maryland Rule 2-421(b)'s requirement that the responding party answer fully and that the "answer shall include all information available to the party directly or through agents, representatives, or attorneys." Thus, Ms. Prepetit-Foster alleged sufficient facts to establish that Mr. Foster's omissions constituted constructive fraud.

II. Extrinsic or Intrinsic Fraud

Although Prepetit-Foster alleged sufficient facts to establish constructive fraud—and the court, in considering the motion to dismiss, assumed that fraud took place—she still had the burden to prove that the fraud which occurred was extrinsic fraud. In Maryland, a court is only authorized to revise an enrolled judgment for fraud if the fraud is not intrinsic to the trial itself. *Schneider v. Schneider,* 35 Md. App. 230, 238 (1977). "To establish fraud under Rule 2-535(b), a movant must show extrinsic fraud, not

intrinsic fraud." *Pelletier v. Burson*, 213 Md. App. 284, 290 (2013) (quoting *Jones v. Rosenberg*, 178 Md. App. 54, 72 (2008)). Extrinsic fraud is fraud that is collateral to the matter before the court. *Hresko v. Hresko*, 83 Md. App. 228, 232 (1990) (extrinsic fraud "is collateral to the issues tried in the case where the judgment is rendered" (quoting *Black's Law Dictionary* (5th ed. 1979))). The *Hresko* court went on to explain:

> Fraud is extrinsic when it actually prevents an adversarial trial. In determining whether or not extrinsic fraud exists, the question is not whether the fraud operated to cause the trier of fact to reach an unjust conclusion, but whether the fraud prevented the actual dispute from being submitted to the fact finder at all.

Id. (citing *Fleisher v. Fleisher Co.*, 60 Md. App. 565, 571 (1984)).

Extrinsic fraud prevents a party from adjudicating his rights before a court. The Court of Appeals, quoting the Supreme Court, described extrinsic fraud as:

> 'Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side, these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing.'

Schwartz v. Merchs. Mortg. Co., 272 Md. 305, 309 (1974) (quoting *United States v. Throckmorton*, 98 U.S. 61, 65-66 (1878)); *see also Pelletier*, 213 Md. App. at 290-91 ("Fraud is extrinsic when it actually prevents an adversarial trial but is intrinsic when it is employed during the course of the hearing which provides the forum for the truth to

appear, albeit, the truth was distorted by the complained of fraud." (quoting *Jones*, 178 Md. App. at 73)).

Intrinsic fraud, on the other hand, is defined as "'[t]hat which pertains to issues involved in the original action or where acts constituting fraud were, or could have been, litigated therein.'" *Hresko,* 83 Md. App. at 232 (quoting in part *Black's Law Dictionary* (5th ed. 1979)). Fraud is intrinsic "when it is employed during the course of the hearing which provides the forum for the truth to appear, albeit that truth was distorted by the complained of fraud," because "the very object of the trial is to assess the truth or falsity of the often conflicting testimony and documents presented." *Schwartz*, 272 Md. at 309.

An enrolled judgment "'will not be vacated even though obtained by the use of forged documents, perjured testimony, or any other frauds which are '*intrinsic*' to the trial of the case itself.'" *Hamilos v. Hamilos*, 297 Md. 99, 105 (1983) (quoting *Schwartz*, 272 Md. at 308). The public policy of finality of judgments undergirds the requirement that fraud be extrinsic to modify a judgment.

> [O]nce parties have had the opportunity to present before a court a matter for investigation and determination, and once the decision has been rendered and the litigants, if they so choose, have exhausted every means of reviewing it, the public policy of this State demands that there be an end to that litigation ... [.] This 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.

Pelletier, 213 Md. App. at 291 (quoting *Jones*, 178 Md. App. at 73).

In the case *sub judice*, the circuit court relied on *Hresko* in which we rejected the appellant's assertion of extrinsic fraud perpetrated during negotiations of a settlement

agreement. The *Hresko* Court addressed a husband's motion to vacate a divorce decree on the ground that the wife concealed assets during negotiations leading to a separation and property settlement agreement. The Court explained, "[i]n determining whether or not extrinsic fraud exists, the question is not whether the fraud operated to cause the trier of fact to reach an unjust conclusion, but whether the fraud prevented the actual dispute from being submitted to the fact finder at all." *Hresko*, 83 Md. App. at 232. The Court noted that the "[a]ppellant had every opportunity to examine [the fraudulent] representations through discovery methods or in court," but chose not to. *Id.* at 236.

Similarly, Ms. Prepetit-Foster had the opportunity to examine Mr. Foster's pay stubs against his representations about his retirement accounts through discovery. It cannot be said that the alleged facts showing constructive fraud in this case related to matters outside the litigation. Indeed, as in *Hresko*, the question of retirement assets was central to the litigation and not collateral to it. Accordingly, we hold that based on the record before us, the circuit court did not abuse its discretion in denying Ms. Prepetit-Foster's motion to reconsider its order dismissing her motion to revise judgment pursuant to Rule 2–535(b) on the ground that Mr. Foster's representations and omissions concerning his retirement accounts constituted intrinsic fraud.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED.

COSTS TO BE PAID BY THE APPELLANT.