UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1429

September Term, 2013

AUGUSTINE F. FORKWAR

v.

J&J LOGISTICS, INC.

Woodward,
Wright,
Graeff,

JJ.

Opinion by Woodward, J.

Filed: December 12, 2014

On November 26, 2004, a vehicle driven by appellant, Augustine Forkwar, was struck by a commercial truck driven by Hameed Mahdi. On October 26, 2006, Forkwar filed suit in the Circuit Court for Prince George's County against Mahdi, for negligence, and against appellee, J&J Logistics, Inc. ("J&J"), for negligence under the theory of *respondeat superior*. Mahdi did not file an answer, nor did he appear at trial.

At trial, the president of J&J testified that Mahdi was not an agent or employee of J&J at the time of the accident, following which the circuit court granted judgment in favor of J&J. The trial proceeded against Mahdi only, and the jury found in favor of Forkwar and against Mahdi, awarding damages in the amount of $180,756.76, plus costs.

Forkwar then attempted to collect the judgment from Empire Fire and Marine Insurance Company ("Empire"), Mahdi's motor vehicle insurer. Empire removed the case to the United States District Court for the District of Maryland, where the District Court granted Empire's motion for summary judgment, concluding that, because at the time of the accident Mahdi was operating his vehicle in furtherance of J&J's business, Empire was not responsible for the judgment against Mahdi under the "Business Use exclusion" provision of Mahdi's policy.

Forkwar subsequently filed in the instant case a motion to revise and vacate the judgment in favor of J&J, arguing that, based on the federal litigation, the president of J&J testified falsely at the trial. At the time of the accident, J&J was insured by appellee, Progressive Northern Insurance Company ("Progressive"). Progressive had not participated at the trial, but filed a motion to intervene in order to oppose Forkwar's motion to vacate the

judgment against J&J. On July 26, 2013, the circuit court held a hearing, at the conclusion of which it granted Progressive's motion to intervene and denied Forkwar's motion to vacate.

On appeal, Forkwar presents two questions for our review, which we have slightly rephrased:

> 1. Did the circuit court abuse its discretion when it denied Forkwar's motion to vacate?
>
> 2. Did the circuit court err or abuse its discretion when it granted Progressive's motion to intervene?

For the reasons stated below, we answer the first question in the negative. In light of that determination, we need not reach the second question.

BACKGROUND

On November 26, 2004, while Forkwar and Mahdi were each driving northbound on Interstate 95 in Prince George's County, their vehicles collided. According to Forkwar's complaint, Mahdi "failed to yield the right of way while switching lanes," causing the collision. Forkwar suffered substantial injuries as a result of the collision.

At the time of the accident, Empire was the "non-trucking insurance carrier for [ ] Mahdi." A few weeks after the accident, Empire sent a questionnaire to Mahdi regarding the accident. In his responses to Empire, Mahdi identified J&J as his employer. Mahdi also informed Empire that he was under dispatch by J&J at the time of the accident. As a result, Empire disclaimed coverage for the accident.

On January 18, 2005, a claims specialist for Empire sent a letter to Forkwar's trial counsel informing him that Empire

> is the non-trucking insurance carrier for [ ] Mahdi. Because [ ] Mahdi was under dispatch to J&J [ ] at the time of the accident, we will be unable to provide benefits under this policy.
>
> I have done some research on the claim and found that J&J [ ] is insured with Progressive . . . under Policy No. CA1765349-2. Their telephone number is 440-516-5006 and their fax number is 440-516-9378. This claim has been reported to Progressive [ ]. I ask at this time that you please redirect your representation to that carrier for benefit consideration.

More than one year later, on April 13, 2006, another Empire claims specialist sent a second letter to Forkwar's trial counsel. In that letter, Empire again denied coverage, stating: "Our policy is a Non-Trucking policy. [ ] Mahdi was under dispatch to J&J [ ] at the time of the loss. Since [ ] Mahdi was under dispatch, our policy does not apply. We have disclaimed coverage to [ ] Mahdi and will be unable to make any payments for this claim."

On October 26, 2006, Forkwar filed suit in the Circuit Court for Prince George's County, naming Mahdi and J&J as defendants.[1] In its answer, filed on October 22, 2007, J&J denied that Mahdi was employed by J&J at the time of the accident or that Mahdi was acting within the scope of his employment with J&J.

[1] Forkwar amended his complaint on August 27, 2007, to add his own uninsured motorist carrier, New Hampshire Insurance Company. Forkwar voluntarily dismissed New Hampshire Insurance Company at the conclusion of the presentation of his evidence at trial. New Hampshire Insurance Company is not a party to this appeal.

On November 13, 2008, J&J submitted the following answers to Forkwar's interrogatories:

> **Interrogatory No. 13**: If you contend that plaintiff in any way failed to satisfy any conditions precedent to the entitlement to the provision of coverage secured by J&J Logistics, Inc., or its employee, agents, or servants, or otherwise acted to breach the contract, state specifically the facts upon which you rely, including on what date and in what manner he did so, and include the language of the specific provision(s) of the contract you allege are applicable.
>
> **Answer:** No defendant [sic] was working for or was in the scope of their agency at the time of the occurrence which is the subject of this litigation.
>
> **Interrogatory No. 14:** For what purpose do you contend plaintiff (sic) was operating the vehicle at the time of the subject occurrence.
>
> **Answer:** J&J Logistics, Inc. objects to and respectfully refuses to respond to this interrogatory as phrased because the term "occurrence" is not defined. Without waiving this objection it states Hameed A. Mahdi was operating the vehicle for his own purpose and was not an agent of J&J Logistics, Inc.

A jury trial was held on December 3 and 4, 2008. Mahdi did not appear for trial.[2] Before trial began, the following exchange took place:

> [FORKWAR'S TRIAL COUNSEL]: Here's the long and short of it, Your Honor. Mr. Forkwar was in an accident with a Mr. Hameed Mahdi, the at-fault driver – I'll call him the at-fault driver. The at-fault

[2] An affidavit of service on Mahdi was filed on August 8, 2008. At trial, the trial court noted that "Mahdi wasn't served but it was someone at his address that is over 18 and is of suitable discretion and the relationship is a relative or co-resident and a description of her. So I accept that as service."

driver at the time of collision was either acting on his own behalf or he was acting at the behest of and in furtherance of the interests of the defendant J&J Logistics.
Defendant Mahdi hasn't responded to discovery and he hasn't acted in any way otherwise to defend against the claim, and he's not here today. What I anticipate –

THE COURT: Who is this gentleman here?

[FORKWAR'S TRIAL COUNSEL]: The representative of J&J.

[J&J'S TRIAL COUNSEL]: Marcus Johnson, Your Honor, representative of J&J Logistics.

THE COURT: All right.

[FORKWAR'S TRIAL COUNSEL]: What I anticipate the testimony will show was that the defendant Mahdi was acting at the time of the collision on his own, and the testimony of the gentleman from J&J Logistics will bear that out.

In that event, what I anticipate is that the jury comes back with a verdict that says Mahdi was acting on his own behalf. I got a verdict sheet that captures that finding if they get there. If that happens, then the question of damages has nothing to do with this defendant whatsoever, nothing. So we don't need any cross-examination, we need nothing other than, you know, a very cursory but thorough presentation of the damages issue.

So what I am proposing to the Court we do is we bifurcate the liability and damages, **I'll call two witnesses briefly, I'll call my client about how the accident happened, I'll call Mr. Johnson from J&J Logistics**, and I think after about half an hour, at best, of testimony – I doubt if it's even that long – **we'll ask the jury to reach a finding as to whether defendant Mahdi was negligent and whether when he was driving that vehicle he was acting on his own behalf or acting on behalf of J&J Logistics.**

The verdict sheet anticipates their finding because the state of the evidence is such that I suspect they are going to find that Mahdi was negligent and he was acting on his own, not on behalf of J&J.

THE COURT: All right.

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[FORKWAR'S TRIAL COUNSEL]: If we proceeded with liability and damages the verdict sheet is convoluted.

THE COURT: Because they would just find whether he was acting on behalf of J&J at the same time they find damages, they find him liable. Was he served?

[FORKWAR'S TRIAL COUNSEL]: Yes, he was.

THE COURT:	So he's in default?
[FORKWAR'S TRIAL COUNSEL]:	Yes. We haven't filed a motion for default.
THE COURT:	No one filed a motion for default?
[FORKWAR'S TRIAL COUNSEL]:	I figured we would proceed to trial. We didn't want a distinct hearing on a default judgment, I wanted to go to the jury and get a distinct verdict, because **we got Mahdi's insurance company on notice and they know he has been served and what they did is they wrote a letter to me saying that it's our position that he was driving for J&J at the time, therefore we are not going to put a lawyer in this thing and we are not going to defend this thing**, which is an unusual position, because it's an issue here at trial**. It is not for them to decide that.** **As I pursue them for a judgment later, if we get that far, I wanted to be doing that with the strength of a jury verdict behind me.**

(Emphasis added).

The case proceeded to trial. At trial, Forkwar called Marcus Johnson, the president of J&J, to testify. Johnson testified that Mahdi was an independent contractor who "had his own truck and [ ] worked for J&J occasionally in the past." Johnson also testified that, to his recollection, Mahdi did not have "any ongoing business relationship with J&J" at that time.

Johnson testified that he was aware of the collision on November 26, 2004, and that Mahdi was not under dispatch to J&J at that time or "in any way acting within the scope of and in furtherance of the interest of J&J."

Following Johnson's testimony, counsel for J&J moved for summary judgment. Forkwar's trial counsel did not oppose the motion, telling the court, "I have nothing further against J&J." The trial court discussed with the parties whether it would be proper to grant summary judgment after the trial had begun. Ultimately, Forkwar's trial counsel offered to close so that J&J could move for judgment, and then reopen the case as to the negligence claim against Mahdi. The trial court granted judgment in favor of J&J as to the *respondeat superior* claim.

After additional evidence, including Forkwar's testimony regarding the accident and his injuries, as well as a videotape deposition of Dr. Raymond Drapkin, the jury returned a verdict in favor of Forkwar and against Mahdi, awarding damages in the amount of $180,756.76 plus costs. Final judgment was entered on December 12, 2008.

On April 14, 2009, Forkwar filed a separate action against Empire in the Circuit Court for Prince George's County to collect the judgment entered against Mahdi. Empire removed the case to the United States District Court for the District of Maryland and filed a motion for summary judgment. Forkwar filed a cross-motion for summary judgment, and the court held a hearing on all motions. Relying on the statements made by Mahdi to Empire that at the time of the accident, he was on his way to a Giant Food warehouse to pick up a load

pursuant to instructions from J&J, the District Court granted Empire's motion. *Forkwar v. Empire Fire & Marine Ins. Co.*, No. 09-1543, 2010 WL 3733930, at *20 (D. Md. Sept. 20, 2010) (unpublished). The District Court rejected Forkwar's collateral estoppel argument and concluded that, as a matter of law the "Business Use exclusion" provision of Mahdi's policy with Empire applied, and thus Empire was not required to pay the judgment in favor of Forkwar. *Id.* at *17, 20. The United States Court of Appeals for the Fourth Circuit affirmed the District Court's ruling.[3] *Forkwar v. Empire Fire & Marine Ins. Co.*, 487 Fed. App'x. 775 (4th Cir. 2012) (unpublished).

On November 2, 2012, Forkwar filed in the instant case a motion to revise and vacate the judgment in favor of J&J ("the motion to vacate"). Forkwar argued that "J&J was able to obtain a judgment in its favor by perpetrating a fraud on the Court. J&J falsely claimed that it had no business relationship with Mr. Mahdi whatsoever. Forkwar later learned – and it has been judicially determined – that at the time of the accident Mr. Mahdi was working for J&J and in furtherance of J&J's business." On March 29, 2013, J&J's insurer,

[3] At some point after the Empire litigation, Forkwar filed suit in state court against Progressive. This litigation was also removed to federal court, and, on December 14, 2012, the U.S. District Court granted Progressive's motion for summary judgment, holding that the original judgment in favor of J&J was *res judicata* and that Progressive's MCS-90 insurance coverage was not available. *Forkwar v. Progressive N. Ins. Co.,* 910 F. Supp. 2d 815 (D. Md. 2012), *aff'd per curiam,* 537 Fed. App'x. 197 (4th Cir. 2013) (unpublished). Despite its success in federal court, Progressive sought, in the instant case, to intervene and oppose the motion to vacate, because granting the motion would jeopardize its victory in federal court.

Progressive, moved to intervene in order to oppose the motion to vacate. On April 18, 2013, Forkwar filed an opposition to Progressive's motion to intervene.

The circuit court held a hearing on July 26, 2013 on the motion to vacate and the motion to intervene. After hearing argument, the circuit court granted the motion to intervene, stating:

> I recognize that Progressive was on notice when this incident happened in 2006 of the suit against J&J and did not intervene and the argument that is put forth for not intervening at that time was that there was no duty to defend J&J, there was no coverage under the policy and so therefore Progressive did not find that they had an interest to be involved in the case that was before the Court in 2006. And now, in light of the subsequent actions filed against J&J – against Progressive that is, that's in Federal Court and in light of that MCS90 provision that they feel that – and I would have to say on the decision by Judge Williams in Federal Court regarding all of that, which is on appeal, they – Progressive moved to intervene on the basis that there was an interest to argue against or oppose a motion to vacate the judgment.
>
> In light of the argument, I am going to allow Progressive to intervene for the purposes of this hearing. I believe that – am satisfied that they did not have an interest early on in '06 to be involved in the case and it was their call not to. They didn't think – it would be a waste of their time, didn't think they really had a real interest, but now you do. I certainly see that you do in light of that [sic] has taken place, so I will allow you to intervene for purposes of this hearing.

The circuit court also denied the motion to vacate, determining that the fraud alleged was intrinsic and thus, "I think that I don't really have a choice but to deny the motion to vacate in light of the fact that the fraud was not extrinsic."

DISCUSSION

Forkwar contends that the circuit court erred or abused its discretion by denying his motion to vacate due to fraud under Section 6-408 of the Courts & Judicial Proceedings (I) Article ("CJP"). According to Forkwar, representatives of J&J fraudulently submitted sworn answers to interrogatories and testified at trial that Mahdi was not an agent of J&J at the time of the accident. Forkwar complains that "the artificial distinction between 'extrinsic' and 'intrinsic' fraud is outdated, confusing, and leads to inconsistent results. Court's [sic] around the country have in recent years rejected or abrogated this distinction."

In response, Progressive argues that the trial court properly denied Forkwar's motion to vacate, because Forkwar could not show that there was any extrinsic fraud, as required by Maryland law. Progressive asserts that Forkwar's only claim of fraud was the alleged perjury of the J&J president that Mahdi was not working for J&J at the time of the accident, and that this claim is intrinsic fraud that does not permit the reopening of the judgment. Progressive contends that there is nothing close to extrinsic fraud in this case, such as an attempt to keep Forkwar or his counsel from investigating the facts of the case, and that Forkwar could have at least attempted to depose Mahdi to obtain evidence that he was operating the vehicle on behalf of J&J. We agree with Progressive.

"We review the denial of a motion to vacate an enrolled judgment under an abuse of discretion standard." *Bland v. Hammond*, 177 Md. App. 340, 346 (2007). 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.'" *Das v. Das,* 133 Md. App. 1, 15 (2000) (alteration in original) (quoting *North v. North*, 102 Md. App. 1, 13-14 (1994)). This Court has found a trial court to have abused its discretion when (1) it appears that the ruling was "made on untenable grounds;" (2) the ruling is "clearly against the logic and effect of facts and inferences before the court;" (3) the ruling is "clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result;" (4) the ruling is "violative of fact and logic;" or (5) the ruling constitutes an "untenable judicial act that defies reason and works an injustice." *Das*, 133 Md. App. at 15 (citations and internal quotations omitted).

The trial court has the authority to revise a judgment pursuant to CJP §6-408 and Rule 2-535. CJP §6-408 provides:

> For a period of 30 days after the entry of a judgment, or thereafter pursuant to motion filed within that period, the court has revisory power and control over the judgment. After the expiration of that period the court has revisory power and control over the judgment only in case of fraud, mistake, irregularity, or failure of an employee of the court or of the clerk's office to perform a duty required by statute or rule.

Similarly, Rule 2-535 establishes a thirty-day window in which a court may exercise revisory power to alter or amend the judgment. After the thirty-day period has passed, a trial court may vacate or revise a judgment only upon a showing of fraud, mistake, or irregularity. Rule 2-535(b). "The purpose of the rule is to ensure the finality of judgments. The Maryland cases are legion that recognize the principle that there must be a definite and foreseeable end

to litigation, and that ordinarily judgments should not be vacated after the passage of the 30-day review period." *Bland*, 177 Md. App. at 347-48 (citations omitted).

Forkwar is correct that neither the statute nor the rule defines "fraud." However, "fraud" that may be the basis for vacating an enrolled judgment has been judicially defined as fraud that is "extrinsic." *See Oxendine v. SLM Capital Corp.*, 172 Md. App. 478, 492 (2007) ("It is black letter law in Maryland that the type of fraud which is required to authorize the reopening of an enrolled judgment is 'extrinsic' fraud and not fraud which is 'intrinsic' to the trial itself."); *see also Hamilos v. Hamilos*, 297 Md. 99, 105 (1983); *Hresko v. Hresko*, 83 Md. App. 228, 232-36 (1990).

In 1974, the Court of Appeals stated in *Schwartz v. Merchants Mortgage Co.* that "fraud is extrinsic when it actually prevents an adversarial trial." 272 Md. 305, 309 (1974). The Court elaborated by providing examples of "extrinsic fraud" as set forth by the United States Supreme Court in *United States v. Throckmorton*, 98 U.S. 61 (1878):

> "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, 272 Md. at 309 (quoting *Throckmorton*, 98 U.S. at 95).

Conversely, "*[i]ntrinsic fraud occurs within the case itself when, for example, a witness perjures himself* or a party offers a forged instrument into evidence. Even if a perpetrator of intrinsic fraud occasionally succeeds in distorting the truth, our adversarial system is the best hope for ferreting out such deception." *Das v. Das*, 133 Md. App. 1, 18 (2000) (emphasis added) (citations omitted). The Court of Appeals has stated that it is

> **settled beyond question that an enrolled decree 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. Underlying this long settled rule is the principle that, once 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.

Schwartz, 272 Md. at 308 (emphasis added). Thus, where the alleged fraud is perjury, such fraud is "intrinsic" and cannot be the basis for vacating an enrolled judgment. *See Hamilos*, 297 Md. at 105-07 (declining to vacate an enrolled decree obtained based on perjured testimony because the false statements were intrinsic to the proceedings).

The basis of the fraud claimed by Forkwar in the instant case is the alleged false statements by J&J's president that Mahdi was not an employee or agent of J&J at the time of the accident. It is abundantly clear, and even conceded by Forkwar, that the alleged fraud is intrinsic. Therefore, such fraud cannot be the basis for vacating the enrolled judgment in favor of J&J. Accordingly, it was not an abuse of discretion for the trial court to deny Forkwar's motion to vacate. Indeed, it would have been an abuse of discretion for the trial court to grant the motion.

Nevertheless, Forkwar asks us to change the established law of Maryland by abolishing the distinction between extrinsic and intrinsic fraud, thus allowing a trial court to vacate an enrolled judgment for any fraud. We decline to do so, because the authority to change Maryland law rests with the Court of Appeals, particularly when the principle at issue is as well-established as it is in this case. "[T]he declaration of the common law of Maryland . . . is the primary function of the highest court in Maryland, the Court of Appeals." *Kulikov v. Baffoe-Harding*, 215 Md. App. 193, 208 (2013) (alteration in original) (citing *Evergreen Assocs., LLC v. Crawford*, 214 Md. App. 179, 191 (2013)). We apply the same principle to a judicially established interpretation of a rule or statute announced and followed by the Court of Appeals. *See Frey v. Frey*, 298 Md. 552, 557 (1984) (stating that the Court of Appeals retains "the power . . . to change the common law and abrogate judicially created rules").

Even if an enrolled judgment could be set aside for "intrinsic" fraud, we would not be inclined to find an abuse of discretion in this case, because Forkwar's own trial strategy precluded the possible exposure of the fraud in the trial. Forkwar was aware of Empire's position that it would not defend Mahdi at trial because it believed that Mahdi was "under dispatch to J&J Logistics at the time of the accident." The record is clear that Empire sent two letters to Forkwar's trial counsel indicating as much, and Forkwar's trial counsel acknowledged receipt of the letters at trial. Nothing in the record, however, indicates that Forkwar attempted to investigate Empire's claim that Mahdi was an agent or employee of

J&J at the time of the accident. Moreover, Forkwar propounded no interrogatories or requests for production of documents on J&J, nor did Forkwar take any depositions of J&J or any of its employees. In sum, "Forkwar made no effort to affirmatively demonstrate that J&J was liable." *Forkwar v. Empire*, 487 Fed. App'x. at 776.

Forkwar relied solely on the testimony of J&J's president that Mahdi was not working for J&J, despite the knowledge that Empire believed the contrary. The fact that Forkwar relied on a witness who allegedly perjured himself is not sufficient to reopen the judgment, for the very reasons identified in Maryland case law. "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*, 177 Md. App. at 350 (citing *Schwartz*, 272 Md. at 309).

For these reasons, we hold that the trial court did not abuse its discretion in denying the motion to vacate. In light of that determination, we need not reach the second question as to whether the trial court erred or abused its discretion in granting Progressive's motion to intervene.[4]

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; APPELLANT TO PAY COSTS.

[4] We fail to see how, if the trial court did not abuse its discretion in denying the motion to vacate, any error in granting the motion to intervene would change the result on remand.