STATE OF MICHIGAN

COURT OF APPEALS

DANA MARIE BURNHAM,

Plaintiff/Counterdefendant-Appellant,

v

KENNETH J. BURNHAM, II,

Defendant/Counterplaintiff-Appellee.

UNPUBLISHED
April 29, 2021

No. 353454
Lapeer Circuit Court
LC No. 19-052746-DM

Before: LETICA, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

In this divorce settlement case, plaintiff appeals by right the trial court's order granting defendant's motion to set aside both the February 11, 2020 order that granted plaintiff's motion for relief from judgment and the February 25, 2020 amended judgment of divorce, and reinstated the October 11, 2019 consent judgment of divorce. The trial court further imposed $4,000 in costs and attorney fees upon defendant for his failure to appear or respond to plaintiff's motion to set aside the judgment under MCR 2.612(C)(1)(c) (fraud, misrepresentation, or other misconduct of an adverse party). On appeal, plaintiff argues that the trial court erred by assigning plaintiff the burden of proof to establish defendant's alleged fraudulent concealment of three pensions at the February 26, 2020 evidentiary hearing on defendant's motion. Plaintiff also argues that the trial court abused its discretion by finding that defendant did not fraudulently conceal the three pensions from plaintiff. We affirm.

I. PROCEDURAL HISTORY

On April 5, 2019, plaintiff filed a complaint for divorce with the trial court. Defendant responded with a counterclaim for divorce. Both plaintiff and defendant, through their respective counsel, requested that the trial court enter a judgment of divorce with a fair and equitable division of marital assets. Later, without the assistance of their attorneys, the parties negotiated terms that defendant's attorney thereafter incorporated into a consent judgment of divorce.

Relevant to this appeal, the consent judgment contained a provision captioned "**PENSION, ANNUITY OR RETIREMENT BENEFITS**." The only retirement benefit specifically named

was defendant's annuity that would be divided equally after a $19,000 deduction for defendant's premarital contributions. The remainder of the provision read:

> [E]xcept as provided for hereinabove, pursuant to [MCL 552.101], each party is individually awarded any and all interests that either may have received, whether vested or unvested, as a benefit of his or her employment during the term of this marriage in any of the following:
>
> A. Any pension, annuity or retirement benefits;
> B. Any accumulated contributions in any pension, annuity or retirement system;
> C. Any right or contingent right in and to invested pension, annuity or retirement benefits.

The consent judgment also contained a verification provision. The parties confirmed that they read and understood the consent judgment. They further declared that, to the best of their knowledge, they had "fully disclosed to my spouse all assets in which I have any ownership interest and this [j]udgment distributes all the assets and only those assets which we have disclosed to each other."

On October 10, 2019, the trial court held a pro confesso hearing. Plaintiff's counsel reviewed the consent judgment of divorce with plaintiff to ensure that its provisions were accurate. The following exchange occurred:

> *Q*. Each of you are to maintain your own bank account. There is no pension, annuity or any other retirements being awarded by this judgment. You will each keep your own, if you have any. You will also—is that correct?
>
> *A*. We have the annuity.
>
> *Q*. Oh, excuse me. All right. The—you will—the defendant will award you 50 percent of his current value of his—$19,000 of his IBEW Local Number 58 Annuity Fund; is that correct?
>
> *A*. The [$]19,000 is what he had before so—
>
> *Q*. Oh, excuse me, that's the premarital portion. He will award you 50 percent of what's in there but for the $19,000?
>
> *A*. Correct.

The next day, the trial court entered the consent judgment of divorce.

Thereafter, plaintiff continued to reside with defendant. On December 9, 2019, plaintiff texted defendant: "Do you have another pension I don't know about . . . I've just been contacted by my attorney." Defendant responded: "Yes live [sic] it alone or we will battle."

The following day, plaintiff's attorney emailed defendant's attorney and inquired whether they could resolve the issue by amending the consent judgment of divorce to divide the pensions in lieu of plaintiff pursuing a motion for relief from judgment under MCR 2.612(C)(1)(c). Defense counsel responded that he "would be shocked if [plaintiff] didn't know about it since [defendant] . . . had a pension with the union for the whole marriage." Defense counsel also believed that defendant received regular statements regarding his pension. Defense counsel further stated that he would "find out if it was contemplated as part of the agreement" and asked how plaintiff claimed to have "just found out."

On January 21, 2020, the day after plaintiff left the marital home, she filed a motion for relief from judgment under MCR 2.612(C)(1)(c), asserting that defendant fraudulently failed to disclose, or otherwise misrepresented, that he had three additional pensions. In support, plaintiff attached a copy of the parties' text messages.

A week later, on January 28, the trial court held a hearing on plaintiff's motion. Neither defense counsel nor defendant responded to plaintiff's motion or appeared at the hearing. Plaintiff reported that defendant had been personally served with the postjudgment motion. Plaintiff's counsel explained that plaintiff and defendant attempted to reconcile after the divorce complaint was filed. When this attempt failed, the parties drafted a settlement agreement that defense counsel converted into the consent judgment of divorce. Although the consent judgment reported that defendant had only one annuity, plaintiff discovered that defendant had three additional pensions that he failed to disclose. The trial court agreed that defendant verified that he had disclosed all of his assets in the consent judgment and ruled that plaintiff was entitled to 50% of each of the three undisclosed pensions.

Days later, on February 3, 2020, defendant filed a motion to set aside the trial court's order on plaintiff's motion for relief from judgment.[1] Defendant explained that no one appeared for the hearing because his attorney had been told that plaintiff was instructing her attorney to no longer pursue his pensions. Moreover, although only defendant had been served with the motion, defendant believed that defense counsel had also been served and would respond to the motion, which did not occur. In fact, plaintiff's counsel contacted defendant's counsel regarding this issue earlier and, on the same day that plaintiff's motion was filed, they reviewed another postjudgment matter. In response to plaintiff's allegations of fraud and misrepresentation, defendant asserted that plaintiff knew about the pensions. Defendant attached letters from plaintiff's daughter and plaintiff's daughter's grandfather to support his claims.

Plaintiff responded that service on defendant alone was proper and that defendant chose not to attend the hearing. Plaintiff conceded that she was unsure about proceeding with her motion while she and defendant continued to share the marital home, but, after conditions became intolerable, she left and filed the motion. Plaintiff claimed that the week before the hearing defendant had called her to ask if he had to be in court; she suggested he speak to his attorney.

[1] At that point, the court had not entered an order on plaintiff's motion. Defense counsel apparently recognized this because he asked the court to "set aside its ruling and[,] if deemed appropriate[,] set this . . . matter for a hearing."

According to plaintiff, defendant also called her after the hearing to inquire about what occurred. Plaintiff told defendant he would know if he had been there. Plaintiff reported that defendant sent her a text message that "his attorney had told him to sit back and wait."[2] Plaintiff also objected to defendant's letter exhibits as hearsay and asked the court to dismiss his motion.

The trial court held a hearing on defendant's motion. Defendant argued that the trial court should set aside the order because there was evidence that plaintiff knew about all of defendant's pensions, contrary to what she asserted in her motion for relief from judgment. Additionally, defendant asserted that plaintiff's counsel played a "dirty trick" because she served only defendant with the motion and notice of hearing, despite her emails to defense counsel regarding this specific postjudgment issue. Defense counsel claimed that defendant contacted him only after plaintiff had called defendant to "gloat[]" over their failure to appear. Defense counsel asserted that defendant had been deprived of due process and asked for an opportunity to have a hearing to defend against plaintiff's fraud allegation.

Plaintiff's counsel countered that her motion was a postjudgment issue, so under MCR 2.107(B)(1)(c), she was required to serve defendant, not defense counsel.[3] Although defendant was aware of the hearing date, he failed to call his attorney and apparently opted not to appear given his earlier admission via text.

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[2] This text is not included in the record.

[3] MCR 2.107(B)(1) provides:

> Service required or permitted to be made on a party for whom an attorney has appeared in the action must be made on the attorney except as follows:
>
> * * *
>
> (c) After a final judgment or final order has been entered and the time for an appeal of right has passed, documents must be served on the party unless the rule governing the particular postjudgment procedure specifically allows service on the attorney[.]

Neither the parties nor the court referenced MCR 3.203(I), which governs notice to attorneys in domestic relations matters and requires:

> (1) Copies of notices required to be given to the parties must also be sent to the attorneys of record.
>
> (2) The notice requirement of this subrule remains in effect until 21 days after judgment is entered or until postjudgment matters are concluded, whichever is later.

See also MCR 3.201(C) ("Except as otherwise provided in this subchapter, practice and procedure in domestic relations actions is governed by other applicable provisions of the Michigan Court Rules . . . ."). The parties' original consent judgment included a provision providing that their respective attorneys "are . . . released as attorneys of record in post-judgment proceedings unless specifically hereafter retained for such post-judgment action."

The trial court determined that plaintiff's service on defendant alone did not violate MCR 2.107(B)(1)(c). Accordingly, the trial court concluded that it was required to sign the proposed order granting plaintiff's motion for relief from judgment under MCR 2.612(C)(1)(c). The trial court, however, also allowed defendant an evidentiary hearing on his motion.

Three days later, plaintiff submitted an amended consent judgment of divorce, incorporating the terms of plaintiff's earlier order. On February 25, 2020, the trial court entered the amended consent judgment of divorce, requiring that 50% of each of defendant's three pensions accrued during the marriage be awarded to plaintiff.

The next day, the trial court held an evidentiary hearing on defendant's motion. Plaintiff's nephew, plaintiff's biological daughter, defendant's daughter, defendant's son, and defendant's father all testified that plaintiff had knowledge of defendant's pensions. Indeed, there was testimony that defendant often had conversations with family members that plaintiff was present for and participated in. During these conversations, defendant would encourage family members to join the union because of the union's retirement benefits, including the pensions. Plaintiff's nephew testified that plaintiff herself explained the benefits to him in the early fall of 2019. And plaintiff's daughter testified that plaintiff told her that in the event of a divorce, plaintiff would get half of defendant's pension, benefits, and annuity.

Defendant testified that plaintiff absolutely knew about the pensions. Plaintiff was in charge of opening the mail and the family's finances. Once a year, the union would send defendant an informational packet detailing the pensions, annuity fund, and insurance. In addition to the yearly packet, the union's website explained all of the retirement benefits, including the various pensions and the annuity.

Defendant further described the negotiations that occurred when he and plaintiff drafted the consent judgment. Defendant testified that plaintiff told him she was not going to "come after [his] pension because [of] everything else that [he] was giving her," including the $45,000 down payment on their home and a $16,000 loan that he had repaid for plaintiff.

As for defendant's text reply, defendant typically "talked about the main" pension, even though he had two smaller ones. Defendant recognized that the consent judgment did not explicitly state that he would keep the three pensions, but he maintained that he disclosed all of his assets to plaintiff.

When plaintiff testified, she agreed that she handled the family's finances. Plaintiff also agreed that the couple discussed the loan and down payment during their negotiations, but she denied having knowledge about the three pensions. Although plaintiff reviewed the quarterly annuity statements, she never read the yearly benefits package as she and defendant "talked about everything," except for the three pensions. Plaintiff also knew that information pertaining to defendant's benefits was readily accessible online, but she never viewed it.

Although plaintiff had a teaching degree, she had not taught for fifteen years; instead, she worked as a waitress and taught boot camp classes. Plaintiff read the judgment of divorce, including the provision pertaining to "[a]ny pension, annuity or retirement benefits," describing it as "a bunch of mumbo[]jumbo." Plaintiff admitted that she made notes regarding the initial draft

prepared from the parties' settlement negotiations, but not as to the retirement benefits. Plaintiff believed the annuity referenced in the consent judgment was a pension. To plaintiff, an annuity and a pension were the same thing. Thus, when defendant was having conversations about the union's retirement benefits with the family members, plaintiff thought the references to the annuity and the pension denoted the same retirement benefit. Plaintiff did not necessarily believe defendant's witnesses, including her family members, were lying; instead, there was a misunderstanding, in part, because plaintiff thought defendant's annuity was his pension. Likewise, when plaintiff's text inquired about "another pension," she used the word "another" because she "was distraught," and, again, in her mind, the annuity was a pension.

Plaintiff's witness testified that plaintiff was visibly upset when she learned of defendant's pension in December 2019. Plaintiff remarked that she was unaware the pension existed.

After the testimony ended, the court met with the attorneys in chambers before returning to the bench. Noting the divergent positions of the parties and the unfortunate family divide, the court encouraged the parties to continue to explore settlement over the next week. If that failed, the court asked the parties to file proposed findings of fact and conclusions of law.

Two weeks later, plaintiff filed proposed findings of fact and conclusions of law. Plaintiff posed the question as being whether defendant failed to disclose the three pensions to her during their private settlement negotiations. In plaintiff's view, the record was clear that defendant engaged in fraud by omission, and, therefore, plaintiff asked the court to equally divide the three pensions.

Defendant responded with his proposed findings of fact and conclusions of law. Defendant maintained that there was no fraud. At best, the evidence demonstrated that plaintiff made a unilateral mistake of fact and the court should reinstate the original consent judgment of divorce.

On April 8, 2020, the trial court issued its opinion and order. After reviewing the procedural history, the trial court determined that "the overwhelming testimony of discussions and common knowledge of [d]efendant's retirement benefits" established that defendant reasonably concluded and believed that plaintiff was aware of all of defendant's benefits. Further, defendant's testimony indicated that the original consent judgment was negotiated because he gave up certain assets to maintain his small pensions. At best, the evidence showed that plaintiff made a unilateral mistake in believing that defendant's annuity was a pension. Accordingly, the trial court concluded that plaintiff failed to meet her burden of proving by clear and convincing evidence that defendant engaged in fraud. The trial court set aside the February 11, 2020 order granting plaintiff's motion for relief from judgment and the February 25, 2020 amended judgment of divorce, and reinstated the October 11, 2019 consent judgment. This appeal followed.

II. BURDEN OF PROOF

Plaintiff first argues that the trial court erred by assigning plaintiff the burden of proof at the February 26, 2020 evidentiary hearing because the hearing was on defendant's motion. We disagree.

A. MCR 2.612(C)(1)(c)

A motion brought under MCR 2.612(C)(1)(c) addresses the ability of a trial court to "relieve a party or the legal representative of a party from a final judgment, order, or proceeding" premised on "[f]raud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." MCR 2.612(C)(1)(c). "Where a party . . . allege[s] that a fraud has been committed on the court, it is generally an abuse of discretion for the court to decide the motion without first conducting an evidentiary hearing regarding the allegations." *Kiefer v Kiefer*, 212 Mich App 176, 179; 536 NW2d 873 (1995). "An evidentiary hearing is necessary where fraud has been alleged because the proof required to sustain a motion to set aside a judgment because of fraud is of the highest order." *Id*. (quotation marks omitted).

B. BURDEN OF PROOF

"Assigning the burden of proof involves two distinct legal concepts. The first, the burden of production, requires a party to produce some evidence of that party's propositions of fact. The second, the burden of persuasion, requires a party to convince the trier of fact that those propositions of fact are true." *People v Hartwick*, 498 Mich 192, 216; 870 NW2d 37 (2015) (citations omitted). See also *McKinstry v Valley Obstetrics-Gynecology, PC*, 428 Mich 167, 178-179; 405 NW2d 88 (1987). Despite the distinct legal concepts, this Court has recognized that the "burdens of 'persuasion' and 'production' are not, as a practical matter, likely to be very important in most cases as decisions will usually turn on a weighing of the evidence." *Mich Ed Support Personnel Ass'n v Evart Pub Sch*, 125 Mich App 71, 74; 336 NW2d 235 (1983).

C. DISCUSSION

Plaintiff contends that defendant, as the moving party and the party requesting that plaintiff's order be set aside, had the burden of proof. Plaintiff repeats the caption of defendant's motion and asserts that the hearing on defendant's motion was to determine whether the trial court should set aside the order granting plaintiff's motion for relief from judgment, which was based on defendant's fraud, misrepresentation, or other misconduct concerning the nondisclosure of the three pensions. Because the order granting plaintiff's motion was entered before the hearing on defendant's motion to set aside that order, plaintiff asserts that defendant bore the burden of production to provide evidence that there was no fraud, misrepresentation, or other misconduct, and also bore the burden of persuasion to establish that he did not conceal the three pensions by fraud, misrepresentation, or other misconduct.

Defendant responds plaintiff never raised these arguments below. Moreover, the trial court's focus was on the question of whether fraud occurred and plaintiff voiced no objection to bearing the burden of proof. In other words, the trial court afforded defendant the opportunity to be heard on plaintiff's allegations of fraud and imposed costs on defendant for his initial failure to answer and appear on plaintiff's motion. Therefore, the trial court properly placed the burden of production and proof on plaintiff.

Initially, we note that defendant's motion never identified the particular court rule upon which he relied and that defendant's motion was filed before an order on plaintiff's motion was entered. Regardless of the label a party uses, "appellate courts often look to the substance of a

motion . . . to determine its true nature . . . ." *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 326; 657 NW2d 759 (2002).

In this case, defendant denied that plaintiff was entitled to relief on *her* motion due to improper service as well as her knowledge of the pensions. Plaintiff answered and maintained that she properly served defendant and that defendant defrauded her.

At the hearing on defendant's motion, plaintiff continued to argue that defendant defrauded her. Defendant continued to claim that plaintiff was aware of his pensions and that plaintiff's unilateral mistake regarding the annuity being a pension did not warrant setting aside the parties' initial consent judgment. Defendant repeatedly requested an opportunity to be heard on plaintiff's fraud allegation.

At the conclusion of the hearing on defendant's motion, the court granted defendant "a hearing," observing that, if defendant failed to prove fraud, it might impose costs. Defense counsel responded that the burden of proving fraud was on plaintiff as it was her motion. The court replied: "Okay." And defense counsel said: "So, right." Plaintiff's counsel did not object or otherwise indicate that defense counsel was mistaken.

At the subsequent hearing, the court noted that it was conducting an evidentiary hearing on defendant's motion to set aside the order on plaintiff's motion from relief from judgment and asked defense counsel if he was ready to proceed. Defense counsel inquired whether it was appropriate for plaintiff to go forward to demonstrate that her client was defrauded or unaware of the pensions or if the court preferred him to proceed. When the court asked plaintiff's counsel her position, she indicated she would do whatever the court preferred, noting that she had an opening statement and that the court had granted her motion. Plaintiff's counsel stated: "I would leave it to the Court's discretion." The court retorted: "I'm just trying to think of which way makes the most logical sense." Defense counsel proposed that he proceed and, if the court agreed that plaintiff knew, should have known, or had reason to know about the pensions, it should set aside the order granting plaintiff's motion. Plaintiff's counsel responded: "I don't care who goes first but what I do care about is I think the Court needs to hear from both parties."

The court had plaintiff's counsel proceed with opening statement. After defense counsel finished with his opening statement, he asked to call his witnesses, but plaintiff's counsel interjected that the court had told her "to go first." Plaintiff's counsel then asked: "What are we doing, Judge?" The court said that "for efficiency purpose[s] and whoever has witnesses here, if there are any – I did say you should go first so if you have a strong preference to go first . . . ." Plaintiff's counsel then decided that defense counsel should "go ahead" because he had "more witnesses."

In plaintiff's subsequent findings of fact and conclusions of law, plaintiff described the question that the court had to answer as whether defendant failed to disclose three pensions.

Plaintiff argued that defendant had defrauded her and she described the remedy available for fraud.[4]

Given this, the trial court's opinion and order properly addressed whether plaintiff was entitled to relief on her motion. Moreover, to the extent that plaintiff complains that defendant and the court muddled the burdens of production and proof, the record reveals that plaintiff contributed to any error, and, therefore, she is not entitled to relief. *Mueller v Brannigan Bros Restaurants and Taverns LLC*, 323 Mich App 566; 918 NW2d 545 (2018) (quotation marks and citation omitted) ("[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence . . . ."); *Hibbard v Hibbard*, 27 Mich App 112, 116; 183 NW2d 358 (1971) ("Any alleged disorganization or confusion below of which [the] plaintiff complains in this appeal was patently abetted and contributed to by plaintiff herself. She is in no position on appeal to ask this Court for any further relief.").

And, even if we accepted plaintiff's position on appeal regarding the procedural posture of defendant's motion as technically correct, the trial court's error would not necessarily require reversal. Under MCR 2.613(A), "an error in a ruling or order, or an error or defect in anything done . . . by the court . . . is not ground for . . . disturbing a judgment or order, unless refusal to take this action appears to the court to be inconsistent with substantial justice." To that end, the party alleging the error must show "that it was more probable than not that the alleged error was outcome determinative." *Barnett v Hidalgo*, 478 Mich 151, 172; 732 NW2d 472 (2007).

The trial court found that "the overwhelming testimony of discussions and common knowledge of Defendant's retirement benefits" established that defendant did not fraudulently conceal his pensions. Instead, on the basis of the testimony, "it seems like a reasonable conclusion that the Defendant would reasonably conclude and believe that the Plaintiff was aware of all of the Defendant's retirement benefits." The trial court's determination establishes that defendant presented sufficient evidence to show that he did not fraudulently conceal or otherwise misrepresent the status of his pensions. Thus, it is of no consequence that the trial court stated that plaintiff failed to establish her claim of fraud because the trial court found that defendant proved that plaintiff was aware of the pensions. Stated another way, the trial court concluded that defendant showed that he did not fraudulently conceal his pensions, which would accurately reflect that defendant carried his burden of proof.

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[4] Plaintiff also identifies two additional statements in the trial court's opinion and order as being incorrect and demonstrating that the trial court wrongly placed the burden of proof on her:

> The Plaintiff alleges that the case at bar is "replete with fraud" by the Defendant.
>
> The Plaintiff requests that the Court reopen the case for purposes of deciding how to divide the marital portion of the pensions.

Plaintiff, however, fails to acknowledge that the trial court is directly quoting from her conclusions of law and addressing her argument that "there are two sound legal basis [sic] upon which the court can reopen the case to decide how the marital portion of the 3 pensions are to be divided."

Plaintiff also faults the trial court for limiting its opinion to the issue of fraud, despite plaintiff's motion for relief from judgment asserting "misrepresentation or other misconduct" in addition to fraud. In plaintiff's motion for relief from judgment, she cited MCR 2.612(C)(1)(c) as the basis for her motion. The court rule provides that the trial court may relieve a party from a judgment on the basis of intrinsic or extrinsic fraud, misrepresentation, or other misconduct. MCR 2.612(C)(1)(c). Plaintiff's allegations regarding fraud, misrepresentation, and other misconduct all stem from the same alleged nondisclosure, so the precise term used by the trial court in discussing the nondisclosure is immaterial to its ultimate determination that plaintiff was aware of the pensions.

III. RELIEF FROM JUDGMENT

Plaintiff argues that the trial court abused its discretion by granting defendant's motion to set aside the order granting plaintiff's motion for relief from judgment. We disagree.[5]

A. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for relief from judgment for an abuse of discretion. *Peterson v Auto Owners Ins Co*, 274 Mich App 407, 412; 733 NW2d 413 (2007). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). A trial court's findings of fact are reviewed for clear error. *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010). "A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake was made." *Id*.

B. DISCUSSION

Plaintiff argues that the trial court abused its discretion by granting defendant's motion to set aside the order granting plaintiff's motion for relief from judgment because there was no evidence that plaintiff engaged in fraud, misrepresentation, or other misconduct in her motion to set aside the judgment of divorce.

MCR 2.612(C) addresses the grounds for which a party may move for relief from judgment:

> (1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect.

[5] Notwithstanding our conclusion regarding the nature of the hearing, we will address plaintiff's argument as she has raised it in her brief on appeal and assume that defendant bore the burden of proof at the hearing.

(b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).

(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

(d) The judgment is void.

(e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.

(f) Any other reason justifying relief from the operation of the judgment.

In divorce cases, this Court has recommended the "[c]autious application of MCR 2.612(C)(1)[.]" *Rose v Rose*, 289 Mich App 45, 58; 795 NW2d 611 (2010).

As plaintiff notes and we have discussed, defendant's brief in support of his motion to set aside the order did not state this court rule, let alone which subrule he relied on. Regardless, it is reasonable to conclude that defendant could not rely on MCR 2.612(C)(1)(b), (d), or (e)[6] because those provisions do not apply. MCR 2.612(C)(1)(a) also could not apply because the only argument that defendant offered concerning mistake, inadvertence, surprise, or excusable neglect related to plaintiff serving the motion only on defendant, which the trial court determined, was proper under MCR 2.107(B)(1)(c). And MCR 2.612(C)(1)(f) can only apply "to extraordinary situations not covered by subrules (a) through (e)" and when vacating the judgment does not "detrimentally affect[] the rights of the opposing party." *Rose*, 289 Mich App at 59-60.

Thus, it must be considered whether defendant's motion to set aside the order could be based on MCR 2.612(C)(1)(c). Defendant's motion argued that the order should be set aside because plaintiff served only defendant, which defendant asserted was a "dirty trick." The court, however, determined that service on defendant alone satisfied MCR 2.107(B)(1)(c). Defendant's motion also argued that he "has direct evidence that Plaintiff knew about all of his pensions. Her attempt to put a spin on [a] text [message] is simply not evidence." Defendant further argued that the trial court could not set aside the consent judgment because it was negotiated in good faith. Taken together, defendant's arguments could be read as asking the court to set aside the order granting plaintiff's motion for relief from judgment because plaintiff misrepresented that she did not have knowledge of the three pensions. Accordingly, defendant would be required to show by

[6] It is arguable that subrule (e) could apply because defendant could reasonably contend that it was not equitable for the order granting plaintiff's motion for relief from judgment to stand because the basis for the order, defendant's fraudulent concealment of the pensions, was undercut by the evidence that plaintiff was aware of the three pensions. However, this argument is more likely to fall under MCR 2.612(C)(1)(c) because of the argument that plaintiff misrepresented that she did not have knowledge of the three pensions.

clear and convincing evidence that plaintiff misrepresented that she did not have knowledge of the three pensions. See *Foodland Distrib v Al-Naimi*, 220 Mich App 453, 459; 559 NW2d 379 (1996).

At the hearing, defendant called a number of witnesses who testified that plaintiff was present during conversations in which defendant discussed his retirement benefits. Plaintiff's daughter testified that plaintiff said that she would get half of defendant's pension, benefits, and annuity in the event of a divorce. Plaintiff's nephew testified that defendant attempted to get him to join the union and was explaining the benefits. When the nephew did not understand, plaintiff slowly explained all the benefits so that he could understand. Defendant's daughter testified that plaintiff knew about the pensions because they regularly discussed defendant's job and benefits. Further, defendant attempted to persuade his daughter's husband to join the union on the basis of his pensions and annuity. Defendant's daughter also testified that she had personal conversations with plaintiff about finances and the importance of having a job with a pension, like defendant's job that conferred both pensions and an annuity. Defendant's son testified that plaintiff was present for conversations where defendant spoke about his annuity and pensions.

Defendant testified that plaintiff was aware of the three pensions because during their settlement negotiation, plaintiff said that she would allow defendant to keep the three pensions in exchange for defendant releasing his claims to the $16,000 loan repayment and $45,000 house down payment. Defendant further testified that he would not have forgone those claims if plaintiff would not have allowed him to keep the three pensions.

Conversely, plaintiff testified that she was not aware of the three pensions. Even though plaintiff had reviewed the judgment of divorce, which separated pensions, annuities, and retirement benefits, plaintiff explained that she believed an annuity and a pension were different words for the same thing. Therefore, when defendant discussed his pension with family members, plaintiff believed defendant's references to his pension were to the annuity specifically mentioned in the consent judgment. Plaintiff also testified that when she was made aware that defendant might have more pensions than the annuity, she texted defendant and inquired as much. Defendant responded that he did have more pensions that she did not know about.[7]

The trial court concluded that "the overwhelming testimony of discussions and common knowledge of Defendant's retirement benefits" showed that defendant did not fraudulently conceal the three pensions from plaintiff. The trial court's conclusion was not outside the range of reasonable and principled outcomes. Substantial evidence was adduced that plaintiff was present for conversations in which defendant described his union's benefits, including the pensions. Indeed, plaintiff even described and explained the benefits to her nephew, which would necessarily mean that plaintiff had knowledge of the pensions. Plaintiff's only evidence to refute her knowledge was her testimony that she thought that a pension and an annuity were the same retirement benefit and the text message from defendant. But, as the trial court determined, plaintiff's misapprehension was a unilateral mistake that does not warrant amending the judgment of divorce. See *Casey v Auto Owners Ins Co*, 273 Mich App 388, 398; 729 NW2d 277 (2006) ("A

[7] Although plaintiff faults the trial court for not discussing the text message in its opinion's "analysis and conclusion," trial courts are not required to comment on every matter in evidence. *Sinicropi v Mazurek*, 273 Mich App 149, 180; 729 NW2d 256 (2006).

unilateral mistake is not sufficient to warrant reformation."). Additionally, defendant's text message is not "all that really matters," as plaintiff asserts. Instead, the text message was a piece of evidence that stood in opposition to the testimony of defendant's witnesses. The trial court found the testimony of defendant's witnesses more persuasive than defendant's text message. This finding was not clearly erroneous, and to the extent that the trial court's finding was based on the credibility of the witnesses, this Court gives deference to the trial court. *Woodington*, 288 Mich App at 355. See also *Phillips v Phillips*, 29 Mich App 127, 131; 185 NW2d 168 (1970) (this Court defers to the special opportunity of the trial court to assess the credibility of witnesses.).

Given the testimony of defendant's witnesses that plaintiff was privy to numerous conversations discussing defendant's pensions, and defendant's testimony that plaintiff consented to him keeping the three pensions in exchange for defendant forgoing his claim to the loan repayment and down payment of the house, the trial court did not abuse its discretion by granting defendant's motion to set aside the order granting plaintiff's motion for relief from judgment.

Affirmed.

/s/ Anica Letica
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood