UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0691

September Term, 2014

KARYN PETTAWAY

v.

FELDMAN ENT GROUP, P.C., ET AL.

Krauser, C.J.,
Meredith,
Arthur,

JJ.

Opinion by Krauser, C.J.

Filed: June 26, 2015

Karyn Pettaway, appellant, brought a medical malpractice action, in the Circuit Court for Montgomery County, against the Feldman ENT Group, P.C., and Jerome Schwartz, M.D., appellees. The suit alleged that Dr. Schwartz had breached the standard of care in performing a tonsillectomy on Pettaway and that his negligence in performing that procedure left her with difficulties in speaking, swallowing, and eating. After a four-day jury trial, judgment was entered in favor of appellees.

Ten months later, Pettaway filed, in the circuit court, a motion under Rule 2-535(b), maintaining that, because of alleged juror misconduct during the trial, the court should exercise its "revisory power and control over the judgment" and grant her a new trial. The "juror misconduct" alleged was that, during trial, a juror conducted independent research regarding tonsillectomies and Dr. Schwartz's credentials and reputation and communicated the results of that research to two other jurors before the trial concluded. Such misconduct, asserted Pettaway, constituted an "irregularity" under Rule 2-535(b), and thus she was entitled to a new trial. After the circuit court denied her motion, Pettaway noted this appeal. For the reasons that follow, we affirm.

I.

In 2008, Pettaway first saw and consulted with Jerome Schwartz, M.D., about her history of tonsillitis. The doctor was a specialist in otolaryngology, which is the "combined specialties of diseases of the ear, pharynx, and larynx, including the upper respiratory tract and diseases of the head and neck, tracheobronchial tree, and esophagus." *Stedman's Medical Dictionary* (28th ed. 2006) 1395. At that time, Dr. Schwartz, who was then

employed by the Feldman ENT Group, recommended a tonsillectomy and, on March 24, 2008, performed that procedure on Pettaway.

In the medical malpractice complaint she filed in the Montgomery County circuit court in March of 2012, Pettaway alleged that, during the appointments with Dr. Schwartz that followed her surgery, she complained to the doctor of "gagging, difficulty swallowing, and having food stick in the back of her throat." The complaint further alleged that she developed "marked nasality and difficulty with speech, which she did not have prior to surgery," which was all due to Dr. Schwartz's negligence in performing the tonsillectomy. In particular, the complaint alleged that Dr. Schwartz, during the tonsillectomy, had negligently removed the "left posterior tonsillar pillar" and "extended the operation" to remove additional tissue, causing "injury" and "scarring" to her soft palate, and that her difficulties in swallowing, eating, and speaking resulted from those tissue removals.

A four-day jury trial was held in June of 2013. The jury found, on June 20, 2013, that Dr. Schwartz was not negligent in the performance of the tonsillectomy, and the circuit court entered judgment in his and Feldman ENT's favor.

Ten months later, on April 30, 2014, Pettaway filed, in the Montgomery County circuit court, a motion under Rule 2-535(b), requesting that the court exercise its revisory power and order a new trial[1] because of "juror misconduct" during the course of her trial. Pettaway's motion asserted that, in disregard of the court's repeated warnings, during trial,

[1] Pettaway had previously noted, on July 17, 2013, an appeal to this Court. She voluntarily dismissed that appeal on April 30, 2014—the same day she filed her motion in the circuit court.

to the members of the jury that they were not to discuss the case amongst themselves or conduct any independent research, three of the six jurors took part, on the second day of trial, in a discussion regarding the internet research that one juror had done on tonsillectomies and, specifically, on Dr. Schwartz. This independent research, as characterized by the motion, was "prejudicial" to Pettaway's case, as it was "one-sided and favorably disposed" to appellees, "both on the central issue of liability as well as the issue of Dr. Schwartz's background, stature, and credibility."

Attached to Pettaway's motion was an affidavit of her daughter, Jalyssa Pettaway, who had testified at trial on her mother's behalf regarding the changes in her mother's voice and eating habits since the tonsillectomy. In that affidavit, Jalyssa stated that she was "present in the lobby area" of the courthouse during the course of the trial and that there were "one [or] more occasions during the trial where the jurors . . . were either dismissed for break from court or returned from break, and sat in the lobby area" near where she was seated. She further alleged:

> 3. On one of these occasions, during the second day of the trial, I overheard a specific conversation between and among certain jurors. One juror, an older Caucasian woman with blonde hair and a reddish complexion explained to at least two of the other female jurors that she had researched tonsillectomies (the operation at issue in the case); she told them that there was a healing process that usually took a certain number of days, and that, according to her research, there was no evidence that she found that something like what happened to Ms. Pettaway had ever occurred before; and she explained that she had checked into it herself. She said to them that she found nothing in her research to support that what occurred to Ms. Pettaway could even happen from a tonsillectomy, according to her research. She also told the other jurors that she had researched Dr. Schwartz, and she told them that he was very well educated, that he was a published author, and that he also teaches. I heard and saw this conversation take place during the course of the second day of the trial. I saw the other female jurors listening

> intently to the juror who had performed the outside research. They were all engaged in the conversation.
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> 4. I was seated in the lobby because, as a possible witness, I was not allowed in the courtroom. These conversations occurred prior to my testifying in the case. I did not say anything to anyone about what I heard and saw because I had no idea that such a conversations may be inappropriate. It was only when Ms. Pettaway retained a new attorney for her appeal that he asked about any and all things that occurred at any time in the course of the trial which may have seemed notable or irregular in any way. When my mother mentioned she was preparing a list of her recollections to respond to her attorney's inquiry, and explained what the attorney asked her, the above conversation I overheard among the three jurors came to mind, so I told her about it.

Appellees opposed the motion, asserting, among other things, that, in order to prevail on a motion under Rule 2-535(b), Pettaway was required to show not only that "fraud, mistake, or irregularity" had occurred but that she had filed her motion with "ordinary diligence" and in "good faith" as well. Pettaway, according to appellees, had shown neither. In fact, Pettaway had waited, appellees pointed out, ten months from the date the jury rendered its verdict and had been discharged to file her motion, and it was "unfathomable," declared appellees, that Pettaway's daughter would not have mentioned to her mother the conversation between the jurors when it happened or, at least, before the trial concluded or shortly thereafter.

The circuit court subsequently denied Pettaway's motion.

II.

Pettaway contends that the circuit court abused its discretion in denying her motion for a new trial. In support of that contention, she asserts that the affidavit of her daughter, Jalyssa, established that a juror conducted independent research on both Dr. Schwartz and the medical care he provided to Pettaway, research that was "prejudicial" to Pettaway's

case. This juror misconduct was, in her view, an "irregularity of process or procedure" that the court should have exercised its revisory power to correct, and the only possible correction would be the grant of a new trial.

Pettaway filed her motion under Rule 2-535(b), which pertains to the "revisory power" of a circuit court. That subsection of the Rule provides that "on motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity," but the evidence of that fraud, mistake, or irregularity must be, we have said, "clear and convincing." *Thacker v. Hale*, 146 Md. App. 203, 217 (2002).

Moreover, "Maryland courts 'have narrowly defined and strictly applied the terms fraud, mistake, [and] irregularity,' in order to ensure finality of judgments." *Id.* (brackets in original) (quoting *Platt v. Platt*, 302 Md. 9, 13 (1984)). To that end, the fraud on which a Rule 2-535(b) motion may be based has been limited to "extrinsic" fraud, that is, fraud that "actually prevents an adversarial trial" by keeping "the actual dispute from being submitted to the fact finder at all."[2] *Hresko v. Hresko*, 83 Md. App. 228, 232 (1990). And "mistake" has been construed to refer only to "jurisdictional error, such as where the Court lacks the power to enter judgment." *Pelletier v. Burson*, 213 Md. App. 284, 291 (2013) (quoting *Green v. Ford Motor Credit Co.*, 152 Md. App. 32, 51 (2003)).

[2] "Intrinsic fraud," on the other hand, is fraud which "pertains to issues involved in the original action or where acts constituting fraud were, or could have been, litigated therein." *Hresko v. Hresko*, 83 Md. App. 228, 232 (1990) (internal citation omitted).

But, here, we are concerned with what constitutes the third justification for the exercise of judicial revisory power under Rule 2-535(b), and that is "irregularity," as that was the only ground that underlay Pettaway's motion, and whether the juror misconduct alleged by the affidavit at issue falls within the narrow definition of that term. To begin with, an irregularity has been defined for the purposes of Rule 2-535(b) as "a failure to follow required procedure or process." *Powell v. Breslin*, 430 Md. 52, 72 (2013) (citing *Early v. Early*, 338 Md. 639, 653 (1995)). Such a "nonconformity of 'process or procedure'" is not "a departure from truth or accuracy of which a [party] had notice and could have challenged." *Davis v. Att'y General*, 187 Md. App. 110, 125 (2009) (brackets in original) (quoting *Weitz v. MacKenzie*, 273 Md. 628, 631 (1975)). Rather, it is "the doing or not doing of that, in the conduct of a suit at law, which, conformable to the practice of the court, ought or ought not to be done." *Autobahn Motors, Inc. v. Mayor of Balt.*, 321 Md. 558, 562 (1991). If the judgment under attack, pursuant to a Rule 2-535(b) motion, "was entered in conformity with the practice and procedures commonly used by the court that entered it, there is no irregularity justifying the exercise of revisory powers." *Pelletier*, 213 Md. App. at 290 (quoting *De Arriz v. Klingler-De Arriz*, 179 Md. App. 458, 469 (2008).[3]

[3] Our narrow definition of an "irregularity" that would justify the exercise of a court's revisory power is consistent with the definitions employed by other state appellate courts. *See, e.g.*, *Costello v. McFadden*, 553 N.W.2d 607, 610–12 (Iowa 1996) (defining "irregularity," as the basis for vacating a final judgment, as "some action or inaction on the part of the court or some court personnel" that was "contrary to some prescribed rule, mode of procedure, or court practice involving the conduct of a lawsuit"); *Barney v. Suggs*, 688 S.W.2d 356, 358–59 (Mo. en banc 1985) (describing the remedy of setting aside a final judgment as "very narrow" and defining an "irregularity" in judgment as "the want (contd.)

Since the term "irregularity," as it is used in Rule 2-535(b), is to be "narrowly defined" and "strictly applied," our appellate courts have generally limited its applicability to a circuit court's failure to follow its own processes or procedures, such as the "failure of the clerk to send required notice of a default judgment to the defendant." *Early*, 338 Md. at 652 (internal citation omitted). Other irregularities that have justified the exercise of a court's revisory power have included: a "dismissal without notice," for lack of prosecution, of a party's case by the circuit court, *Mutual Benefit Soc. of Balt., Inc. v. Haywood*, 257 Md. 538, 541 (1970); the failure by the circuit court clerk to send a copy of a final order to a defendant, *Alban Tractor Co., Inc. v. Williford*, 61 Md. App. 71, 79 (1984); and the issuance of a court order terminating a charitable trust when the statutory procedures for terminating such a trust were not followed, *Davis*, 187 Md. App. at 125–26, 128–29.

Given Maryland's well-settled definition of "irregularity" for the purposes of Rule 2-535(b), the juror misconduct alleged in this case does not constitute an "irregularity" under that rule. Nothing in Pettaway's motion suggested that there was "the doing or not doing" by the circuit court "of that, in the conduct of a suit at law, which, conformable to the practice of the court, ought or ought not to be done." *Autobahn Motors*, 321 Md. at

(contd.) of adherence to some procedural rule or mode of proceeding; and it consists either in omitting to do something that is necessary for the due and orderly conduct of a suit, or doing it in an unseasonable time, or improper manner"); *Jones v. Home Care of Wash., Inc.*, 216 P.3d 1106, 1108 (Wash. Ct. App. 2009) (citing *Haller v. Wallis*, 573 P.2d 1302, 1304–05 (Wash. en banc 1978)) (stating that a party may be relieved from a final judgment "for a variety of reasons, including '[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order'" and defining "irregularity" as "the want of adherence to some prescribed rule or mode of proceeding; and it consists either in the omitting to do something that is necessary for the due and orderly conducting of a suit, or in doing it in an unreasonable time or improper manner").

562. That is to say, there is no claim before us that there was any departure from court practice or procedure, nor that the court or its personnel deviated from a required process, nor that the judgment in favor of appellees was not "entered in conformity with the practice and procedures commonly used by the court that entered it." *Pelletier*, 213 Md. App. at 290. In fact, Pettaway's motion stressed that the circuit court appropriately instructed the members of the jury, on multiple occasions throughout the course of the trial, that they were not to discuss the case amongst themselves, or with anyone else, and that they were not to do their own independent research. Any subsequent action on the part of any of the jurors, although it may have been a violation of the court's instructions, was not the sort of "irregularity" contemplated by Rule 2-535(b).

Because Pettaway's motion failed to show, by clear and convincing evidence, that an irregularity under Rule 2-535(b) had occurred, the court did not abuse its discretion in denying her motion.

III.

Even if we were to conclude otherwise and hold that the juror misconduct Pettaway alleged in her motion constituted an "irregularity," Pettaway would still not prevail on her motion. A party seeking revision of a judgment under Rule 2-535(b) must do more than show, by clear and convincing evidence, that a fraud, mistake or irregularity occurred; he or she must also show that the motion was filed "with ordinary diligence and in good faith upon a meritorious cause of action or defense." *Thacker*, 146 Md. App. at 217.

We take the length of time between the entry of the judgment and the motion to exercise revisory power into account when determining whether a party has exercised

ordinary diligence in filing a motion to set aside an enrolled judgment. *See, e.g.*, *Hughes v. Beltway Homes, Inc.*, 276 Md. 382, 383–84, 389 (1975) (finding that appellant had not shown ordinary diligence when he waited six months from the date of a foreclosure sale to file a motion to set aside the "order of ratification" on the basis of fraud or mistake); *Dir. of Fin. of Balt. City v. Harris*, 90 Md. App. 506, 514–15 (1992) (noting that, on remand, appellant "must present a satisfactory explanation of why he waited five months before filing his motion to strike the default judgment" in order to demonstrate ordinary diligence). And, in so doing, we consider "the nature and extent of appellant's actual knowledge," as it is "relevant to the issue of whether appellant acted with ordinary diligence in pursuing its motions to vacate." *City of College Park v. Jenkins*, 150 Md. App. 254, 274 (2003), *vacated on other grounds*, 379 Md. 142 (2003).

It is upon the ordinary diligence requirement that Pettaway's motion falters. Nothing in Pettaway's motion or the accompanying affidavit suggests that the information about the juror misconduct at issue could not have been uncovered in the ten months following the verdict. Indeed, the affidavit setting out the allegations of juror misconduct was not given by a witness who was previously unknown to Pettaway, could not be contacted during or after the trial, and had no interest in the outcome of the lawsuit. The affidavit was from Pettaway's own daughter, who, at the time of the trial, was a college-educated twenty-four-year-old woman who lived with Pettaway and who remained in the courtroom after testifying to observe the remainder of the trial. In other words, this was an affidavit from an interested, involved, and intelligent witness who had every reason

and every opportunity to tell her mother, at any time during the trial or at any time following the jury's verdict, that her trial might have been impacted by juror misconduct.

Of particular significance to our inquiry is the absence of any sort of statement in the affidavit that this information about the conversation amongst the jurors was never communicated to Pettaway at any point during the trial or following the verdict. Instead, there is simply an assertion that Jalyssa's observations of the jurors' conduct "came to mind" after her mother mentioned that she was, at the prompting of her attorney, making a list of her own recollections about the trial. Stating that the conversation among the jurors "came to mind" ten months after the trial is by no means the equivalent of an assertion that Jalyssa had never told her mother about that conversation before that point or that the first time Pettaway was ever told about the misconduct was ten months after the verdict. Instead, there is only the implication that Pettaway did not act on the knowledge until the misconduct once again "came to mind."

In sum, the ten-month delay between the entry of the judgment and the filing of Pettaway's motion, together with the lack of any statement by Pettaway that she was never previously told about the alleged juror misconduct, indicates that Pettaway did not act with ordinary diligence in filing her motion under Rule 2-535(b). The circuit court therefore did not abuse its discretion in denying that motion.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.