Circuit Court for Howard County
Case No. C-13-FM-18-000446

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3116

September Term, 2018

JOHN LICCIONE

v.

MOEA GORON-FUTCHER

Wright,
Friedman,
Wells,

JJ.

Opinion by Wells, J.

Filed: November 4, 2020

On June 25, 2018, Moea Goron-Futcher, appellee ("Wife"), filed a complaint for absolute divorce in the Circuit Court for Howard County against her husband, John Liccione, appellant ("Husband"). In addition to requesting an absolute divorce, the complaint sought to enforce the terms of a marital property settlement agreement the parties signed nearly six months earlier in January 2018. That agreement contained specific terms relating to alimony, personal and real property, financial accounts, and certain shares of stock.

Pertinent to this appeal, on July 10, 2018, Wife filed a pleading titled, "Motion to Enjoin [Husband] from Dissipation of Marital Assets." Later, on September 19, 2018, Wife filed what she called "Notices of Adverse Interest" to "alert" various financial institutions of her interest in marital property held within them. Husband moved to strike the Notice of Adverse Interest, moved to strike as untimely an affidavit Wife also filed, and moved for sanctions, all of which the court denied.

On January 7, 2019, the circuit court granted the parties an absolute divorce. Eight days later, Husband filed a motion for reconsideration of judgment of absolute divorce. The circuit court denied that motion after a hearing on March 4, 2019.

Husband filed a timely appeal and asks the following questions, which we have condensed and rephrased for purposes of clarity and brevity:[1]

[1] Husband's verbatim questions are:

1. Where a party files an answer to a motion, and where the answer alleges new facts, does the law require a supporting affidavit to be filed simultaneously with the answer?

1. Whether the circuit court abused its discretion when it denied Husband's motion to strike Wife's untimely affidavit?

2. Whether the circuit court abused its discretion when it denied Husband's motion to strike Wife's notices of adverse interest?

3. Whether the circuit court erred when it determined Husband's motion for sanctions was moot?

4. Whether the circuit court abused its discretion when it refused to admit Husband's expert testimony and denied Husband's motion to reconsider the judgment of absolute divorce?

As we will discuss, we perceive no error and affirm the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

This case comes to us after a lengthy and contentious series of legal proceedings. The parties were married for nearly seven years before Husband filed a complaint for absolute divorce on March 10, 2017. On May 25, 2017, Wife was granted a protective order against Husband arising from a physical altercation that occurred between them.

2. Where a party moves to enjoin an adversary from dissipating material assets, but that motion is denied, and where the same party subsequently serves notices of adverse interest on third parties in an effort to achieve the same result as that sought in the motion to enjoin, should the notices of adverse interest be stricken?

3. Where a party causes substantial financial loss to an adversary by servicing a notice of adverse interest with an improper motive, should the party be subject to sanctions?

4. Where an expert personal investigator creates a report, which is based on information provided by third parties that personal investigators commonly rely upon in their field, is the report admissible as an expert opinion?

5. Where a motion to reopen and reconsider a divorce judgment is made within ten days of entry of the judgment and is supported by evidence showing that the plaintiff hid assets from the defendant while the parties negotiated a marital property settlement agreement, should the motion be granted to allow further discovery and a revision of the judgment in light of the hidden assets?

Husband was later arrested and incarcerated for criminal assault. After his arrest, Husband was transferred to the Springfield Psychiatric Hospital in Sykesville, Maryland for mental and somatic treatment. On December 1, 2017, the Howard County Circuit Court determined that Husband was mentally competent to stand trial and he was released from the psychiatric facility.

Five days after Husband's release, at a proceeding before the circuit court on December 6, 2017, the parties, through their respective counsel, informed the circuit court that they had reached a marital property settlement agreement ("MPSA"), which resolved all issues arising from the marriage.[2] After being sworn, both parties acknowledged the essential terms of the agreement on the record. This agreement was later reduced to writing and signed by both parties on January 10, 2018. Among other things, the MPSA required Husband to transfer to Wife 50,000 of 100,000 shares of Tenable, Inc. stock which the couple acquired during their marriage; $75,498.21 was to be transferred to Wife from Husband's Fidelity Investment retirement account via a Qualified Domestic Relations Order ("QDRO"); and all funds held in a 529 college savings plan were to be maintained for the benefit of Wife's daughter.

Another important provision in the MPSA was that Wife would assert her spousal privilege in Husband's pending criminal trial arising from the domestic incident. That trial was scheduled for March 26, 2018. However, because the divorce hearing was scheduled for February 1, 2018, the parties were faced with the fact that Wife would lose the right to

[2] At this same proceeding, the circuit court also granted Wife a Final Protective Order, which expired on May 24, 2018.

assert her spousal privilege, as the parties would no longer be married by the date of the criminal trial. Accordingly, both parties agreed to postpone the divorce hearing, and, if for some reason, Wife could not assert her marital privilege at the criminal trial, the parties agreed to jointly dismiss and refile the complaint for absolute divorce.

That contemplated scenario is exactly what happened; for reasons not fully disclosed, Wife did not assert her spousal privilege, as planned. Consequently, on January 23, 2018, the parties filed a joint line dismissing without prejudice the complaint for absolute divorce, thereby protecting Wife's spousal immunity.

In what might be described as a provocative move, on May 24, 2018, the day the Final Protective Order expired and nearly two months after the conclusion of Husband's criminal case, Husband asked the circuit court to declare the MPSA null and void. Husband's motion led Wife to file several pleadings of her own.

On June 25, 2018, Wife refiled a complaint for absolute divorce in the Circuit Court for Howard County and subsequently filed a motion to enjoin Husband from dissipation of marital assets, fearing that Husband would squander her portion of the marital estate before the divorce hearing. Wife also requested that Husband be prohibited from accessing any marital property specified in the MPSA. The circuit court denied that motion on August 1, 2018.

On July 23, 2018, Husband filed a Counter-Complaint for Absolute Divorce, and surprisingly, requesting that the terms of the MPSA be incorporated and made a part of, but not merged in, any judgment of absolute divorce. Three days later, Tenable, Inc. opened with an Initial Public Offering and its stock shares rose drastically. At a September

7, 2018 hearing, Wife attempted to finalize the divorce and to submit a court order transferring her portion of the Tenable stock per the MPSA. Husband opposed both of Wife's attempts, and the court rescheduled the hearing for January 7, 2019.

Meanwhile, on September 19, 2018, Wife filed with the court a renewed Notice of Adverse Interest to Tenable, Inc., and two Notices of Adverse Interest to Fidelity Investments regarding the couple's IRA and 529 college savings plan. Then, on September 28, 2018 and October 4, 2018, Tenable notified Husband of its receipt of Wife's Notice of Adverse Interest and informed him that it refused to lift a restrictive stock legend on the entire 100,000 Tenable shares rather than Wife's one-half marital share. As a result, on October 7, 2018, Husband filed suit against Tenable seeking, among other things, to have the restrictive legend removed from all 100,000 shares.

Four days later, on October 11, 2018, Husband moved to strike Wife's Notices of Adverse Interest, and, later, filed a Motion for Sanctions and Request for Hearing on October 30, 2018. In response, on October 15, 2018, Wife filed an Answer to Husband's motion and then submitted an affidavit in support of her answer on November 3, 2018. Husband and Wife filed numerous answers in response[3] and a hearing was scheduled for December 19, 2018.

[3] On November 5, 2018, Husband filed a pleading titled, "Motion to Strike [Wife]'s Affidavit in Support of [Wife]'s Answer to [Husband]'s Motion to Strike Notices of Adverse Interest." On November 6, 2018, Wife filed an "Answer to [Husband]'s Motion to Strike [Wife]'s Affidavit in Support of [Wife]'s Answer to [Husband]'s Motion to Strike Notices of Adverse Interest." Finally, on November 14, 2018, Wife filed an answer to the Motion for Sanctions.

At the December 19 hearing, the Circuit Court for Howard County took evidence and testimony from both parties regarding Wife's Notices of Adverse Interest and Husband's motion to strike and motion for sanctions. As will be discussed, the circuit court denied Husband's motions to strike and motion for sanctions. Also, at this hearing the circuit court granted the parties a judgment of absolute divorce. Less than one month later, on January 15, 2019, Husband asked the court to reconsider the judgment of absolute divorce in an attempt to re-open the divorce for further proceedings in relation to the parties' settlement agreement. The court denied Husband's motion to reconsider. Further facts and details of the proceedings will be provided, if needed.

DISCUSSION

I. The Court Did Not Err in Denying Husband's Motions to Strike Wife's Affidavit and Wife's Notices of Adverse Interest

A. Wife's Affidavit

Husband first contends that the circuit court erred when it denied his motion to strike Wife's "Notices of Adverse Interest" and the supporting affidavit. Husband posits that the circuit court should have stricken Wife's affidavit because it was untimely. Wife submitted a supporting affidavit nearly three weeks after she filed an answer to Husband's motion to strike. Husband reasons that the plain meaning of Maryland Rule 2-311(d) necessarily requires that an affidavit in support of a response to a motion and the response be filed simultaneously. If the court had stricken the affidavit, Husband argues that the court would not have considered any new facts contained in the affidavit before deciding his motion to strike. In Husband's estimation, because Wife failed to support her answer/response with

a timely affidavit, Wife's opposition lacked the "required proof" and was insufficient to overcome Husband's motion as a matter of law. As such, the court's failure to strike the affidavit was error. We disagree and explain.

The decision to grant or deny a party's motion to strike lies within the discretion of the trial court. *Patapsco Associates Ltd. Partnership v. Gurany*, 80 Md. App. 200, 204 (1989) (citing *Lancaster v. Gardiner*, 225 Md. 260, 207 (1961)). "Absent prejudice to the defendant, the motion to strike ordinarily should be denied[.]" *Patapsco Associates Ltd.*, 80 Md. App. at 204 (internal citation omitted). As such, motions to strike are reviewed for an abuse of discretion on appellate review. *Id*. We find an abuse of discretion when "no reasonable person would take the view adopted by the [trial] court." *Myers v. State*, 243 Md. App. 154, 179 (2019) (internal quotation omitted).

Under Maryland Rule 2-311(d), "[a] motion or a response to a motion that is based on facts not contained in the record shall be supported by affidavit and accompanied by any papers on which it is based." Husband submits that the plain meaning of this rule, which uses the word "shall," necessarily required that Wife submit an affidavit in support of her response/answer with her response. In Husband's estimation, Rule 2-311(d) plainly barred Wife from submitting an affidavit at any time other than at the time she filed her response. Consequently, Husband argues, the circuit court had no right to consider any fact set forth in Wife's answer. We find Husband's insistence on strict compliance with the formal requirements in 2-311(d) unconvincing.

First, Maryland Rule 1-201(a) states that, "[w]hen a rule, by the word 'shall' or otherwise, mandates or prohibits conduct, the consequences of noncompliance are those

proscribed by these rules or by statute." But, Rule 2-311 does not proscribe any consequences of a party's noncompliance of its supporting affidavit requirements. "If no consequences are prescribed," as is the case here, "the court may compel compliance with the rule or may determine the consequences of the noncompliance in the light of the totality of the circumstances and the purpose of the rule." Md. Rule 1-201(a).

At the parties' hearing on Husband's motion to strike, the court exercised its discretion and made precisely that finding:

> THE COURT: I agree with [Husband's counsel] that an affidavit should be filed with the papers . . . But I don't see anything in [Rule] 2-311 that precludes an affidavit to have been filed supplemental (*sic*) or separate from the motion. What it says is, ["]a motion or a response to a motion that is based on facts not contained in the record shall by supported by an affidavit and accompanied by any papers on which it is based.["] Now I can see that a plain meaning of that may be, you file the motion, you should file the affidavit with it. [. . .]
>
> ***
>
> Could [Wife's attorney] have filed amended pleading or paper and attach the affidavit? Yes, but it's cured, so I don't find that [Husband's Motions to Strike Wife's Untimely Affidavit are] a viable motion. So those two motions are denied.

As Rule 1-201(a) mandates, courts "may determine the consequences of the noncompliance in the light of the totality of the circumstances and the purpose of rule." Here, the motions judge found that Wife effectively cured her noncompliance with Rule 2-311(d) by filing an affidavit (November 3, 2018) nearly three weeks after she filed her answer (October 15, 2018), but nearly a month and a half before the hearing on the motions (December 19, 2018). The court found that the Wife's omission of an affidavit was cured without prejudice to Husband, given the month between the affidavit's submission and the motions hearing. Under these circumstances, the motions court did not render a decision

that "no reasonable person" would have made. *Myers*, 243 Md. App. at 179. The court did not abuse its discretion in not striking Wife's Answer and her supporting affidavit.

B. Wife's Notices of Adverse Interest

Next, Husband, citing language in *Scully v. Tauber*, 138 Md. App. 423 (2001), asserts that if the circuit court had properly stricken Wife's late affidavit, then the court would have been *required* to make a finding in his favor because "where an opposition alleges new facts and those facts are not supported by an affidavit, then the facts cannot be considered by the Circuit Court in reaching its decision on the motion." *Id*. at 431. However, as we previously discussed, the circuit court did not err in accepting Wife's late affidavit and, therefore, could properly consider any facts presented in Wife's answer and/or affidavit.

As for the Notices of Adverse Interest themselves, Husband posits that Wife "attempted an end-run around [the court's denial of Wife's Motion to Enjoin Husband from Dissipating Marital Assets] by filing and serving the notices of adverse interest" in bad faith.[4] As he sees it, Wife participated in "self-help in the face of an unfavorable judicial decision," which he urges us not to "condone or encourage." However, Husband fails to develop this argument any further. He cites no statute or case law in support of this contention, and, in our view, his argument is circular: Wife filed the Notices of Adverse

[4] We note that, in Maryland, a notice of adverse claim, or as it is referred to here, a notice of adverse *interest*, is typically reserved as a function to protect a party's (usually, a corporation) financial assets, normally, but not always, investment securities. Maryland Code, Commercial Law Article ("CL") § 8-102(a)(1) defines "adverse claim" as "a claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer, or deal with the financial asset."

Interest in bad faith because they negatively impacted Husband, and because the notices negatively impacted Husband, they must have been filed in bad faith. As Husband has failed to present a sufficient argument, we consider this contention waived, and affirm the circuit court's judgment on this issue. *See Impac Mortgage Holdings, Inc. v. Timm*, 245 Md. App. 84, 117 (citing Md. Rule 8-504(a)(6); *Klauenberg v. State*, 335 Md. 528, 552 (1998); *Beck v. Mangels*, 100 Md. App. 144, 149 (1994)) (affirming the judgment of the circuit court on the ground that appellant failed "to develop his argument [any] further and cite[d] no case law to support it" and thereby waived his challenge to the circuit court's ruling), *cert. granted*, 469 Md. 656 (2020).

II. The Circuit Court Properly Determined that Husband's Motion for Sanctions Was Moot

In concluding that the circuit court did not abuse its discretion when it denied Husband's motions to strike, we also hold that it did not err in finding that Husband's motion for sanctions was moot. We agree with the circuit court's determination that no sanctions could be applied to a motion that had already been denied. Generally, a question is moot "if no controversy exists between the parties or when the court can no longer fashion an effective remedy." *D.L. v. Sheppard Pratt Health Sys., Inc.*, 465 Md. 339, 351-52 (2019) (internal citations and quotation marks omitted). Considering that the motions court did not abuse its discretion when it denied Husband's motions to strike, we accordingly conclude that there was no longer a controversy between the parties for which the court could fashion a remedy. The motions judge provided Husband's counsel many opportunities to present an argument against mootness, but he failed to do so:

> THE COURT: [. . .] [S]ince I found that the burden was not persuasive, I didn't get over the fifty percent on the Motion to Strike the Adverse Interest, let's just forget the affidavit for a minute, okay? Motion to Strike the Adverse Interest, then what sanctions do I have? I mean what sanctions on what? Do you follow me?
>
> ***
>
> I mean, I just don't know on what the Court would impose sanctions given that the basis for the sanctions is to basically say [Rule] 1-341, against the Plaintiff's (*sic*), which the Court did not find.
>
> ***
>
> So I don't know what I'm left on which the Court could entertain sanctions. That's sort of where I am, i.e., I think it's moot.
>
> [HUSBAND'S COUNSEL]: [. . .] I would suggest that when the Court looks at again that pair of motions together . . . there is this pattern and trend of skirting what is appropriate under the rules. And it started with the filing, with the communications with these financial services providers and it goes to claiming that these shares should be transferred over to the Plaintiff [Wife], directly contrary to the Separation Agreement. This bullying tactic that is continuing throughout, and it's – I concede that it's on the line, I do.
>
> THE COURT: Well if it's on the line, you have the burden to push me over the line, and I'm not pushed yet.
>
> ***
>
> I mean honestly, I truly think it's moot because I don't know on what the Court would impose sanctions given the Court's ruling.

Because the court did not abuse its discretion in its initial determinations, we conclude that it did not err when it found Husband's motion for sanctions to be moot.

III. The Circuit Court Was Within Its Discretion to Deny Husband's Motion to Reconsider the Judgment of Absolute Divorce

Finally, Husband advances three reasons why the circuit court abused its discretion in denying his motion to reconsider the judgment of absolute divorce. *First*, he argues that he lacked the capacity to enter into the MPSA given that he agreed to the terms on record five days after his release from Springfield Psychiatric Hospital. Accordingly, Husband

claims that the circuit court should have re-opened the judgment to allow expert testimony about his mental capacity at the time the MPSA was negotiated.

Second, Husband asserts that, at the hearing on the motion to reconsider, he proffered sufficient evidence that Wife allegedly failed to disclose significant assets she amassed during their marriage, to which, Husband claims, he would have been partially entitled. He also avers that the circuit court erred in denying his motion to reconsider because it refused to admit the reports of a private investigator who allegedly uncovered Wife's supposedly hidden assets. The circuit court, in Husband's estimation, abused its discretion by failing to admit the investigator's reports because, essentially, it set too high of a standard for the admissibility of the expert's testimony.

Lastly, Husband maintains that the court was not required to find that Wife committed fraud when she failed to disclose these assets. As Husband sees it, he invoked the court's authority under both Maryland Rules 2-534, Motion to Alter or Amend Judgment, and 2-535, Revisory Power. He argues Rule 2-535 permits the circuit court to take any action it could have taken under Rule 2-534. However, because he filed his motion to reconsider within ten days of the judgment's entry, Husband contends that Rule 2-534 applies, thereby not requiring him to demonstrate that Wife committed fraud (or mistake or irregularity) and facially entitling him to an order to reopen the judgment.[5] We disagree with all three of Husband's contentions.

[5] In his brief, Husband argues that Maryland Rule 2-535 applies, "and he was not required to demonstrate fraud (or mistake or irregularity) in order to be entitled to an order reopening the judgment." However, we believe this was a typing error, and Husband instead intended to state that Rule 2-534 applies.

A. Husband had Capacity to Enter Into the MPSA

More than a year after Husband was declared mentally competent to stand trial in his criminal assault case, at the hearing on Husband's motion to reconsider the judgment of divorce, Husband's attorney attempted to present evidence of Husband's mental *in*competency at the time the MPSA was signed:

> [HUSBAND'S COUNSEL]: [. . .] ***And I know that this is a stretch, which is why I'm letting the Court know ahead of time,*** capacity at time of execution of the agreement.
>
> ***
>
> [HUSBAND'S COUNSEL]: I think the motion for reconsideration referenced both capacity and new assets. Those were the only two prongs of this argument that we had. But I'm intentionally loudly and clearly telegraphing what this witness would testify to.
>
> ***
>
> [WIFE'S COUNSEL]: Well – so, Your Honor, here's my concern with that . . . Judge Tucker, in this case, on December 1, 2017 found that he [Husband] was competent to stand trial. He entered into, on December 7th, the oral agreement that subsequently became the January 10th, 2018 agreement. . . . He was competent at that time.
>
> ***
>
> THE COURT: All right, I also note that I think even in the Defendant's own pleadings, it says he did not stabilize until August of 2018. And, of course, he was released – forgive me now ….
>
> [HUSBAND'S COUNSEL]: In late 2017.
>
> THE COURT: I would think the fact that he was released would be some positive reflection on his mental health.
>
> [HUSBAND'S COUNSEL]: It would, your Honor, although I'd argue that that release would likely only constitute that he's not a danger to himself or others—
>
> THE COURT: Right.
>
> [HUSBAND'S COUNSEL]: -- rather than capacity and competency.

> THE COURT: I'm going to sustain the objection. I think Judge Tucker may have already ruled on this particular issue.

(emphasis supplied).

When reviewing a circuit court's decision "to deny a request to revise its final judgment," we do so under an abuse of discretion standard. *Pelletier v. Burson*, 213 Md. App. 284, 289 (2013). Husband's argument that he lacked the capacity to enter into the MPSA in the first place is [entirely] untenable. It is true, as Husband reasons, that a marriage settlement agreement is, plainly, a contract between the two parties, *Coffman v. Hayes*, 259 Md. 708 (1970), and, as such, both parties must have the legal competency to enter into such a contract. *Hopkins v. Hopkins*, 328 Md. 263 (1992). It is essential to the validity of a contract that its parties possess the mental competence affording capacity to consent. Alan J. Jacobs & Mary Babb Morris, Md. L. Encyclopedia Contracts, *Parties' Ability to Consent, In General* § 48 (5th ed. September 2020) (citing *Potter v. Musick*, 247 Md. 39 (1967)). "When a competent person signs a contract or disposes of his property in the absence of fraud, misrepresentation, mistake, undue influence, or fiduciary relations, the contract will be enforced." Md. L. Encyclopedia Contracts § 48 (citing *Julian v. Buonassissi*, 414 Md. 641 (2010)).

For criminal purposes, "[a] defendant may not be put to trial unless he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him." *Ryan v. Gonzales*, 568 U.S. 57, 66 (2013) (internal citations and quotations omitted) (cleaned up); *see also United States v. Bernard*, 708 F.3d 538 (4th Cir. 2013). To be "competent" to

stand trial means that a defendant has the present ability to consult with their lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against them. Md. Code Ann., Criminal Procedure ("CP") § 3-101(f). Once the issue of competency has been raised, a determination that an accused is competent to stand trial must be found beyond a reasonable doubt. *Peaks v. State*, 419 Md. 239, 251 (2011); CP § 3-104.

At a hearing on December 1, 2017, the court declared Husband mentally competent to stand trial for a criminal offense. Six days later, Husband, represented by counsel, entered into the MPSA with Wife. Notably, at the time that he acknowledged voluntarily entering into the MSPA in open court, neither Husband nor his counsel objected to the MSPA on the grounds of mental incapacitation. In fact, Husband, represented by counsel, engaged in the following colloquy with his attorney at the December 7, 2017 settlement hearing:

> [HUSBAND'S COUNSEL]: Okay, just so it's clear. *Within the last week you were determined by Judge Tucker of this court to be competent; is that correct?*
>
> [HUSBAND]: **Yes.**
>
> Q: All right. And you currently are under the care of a psychiatrist; is that correct?
>
> A: Yes.
>
> Q: And it is Dr. Joshi?
>
> A: Yes.
>
> Q: Okay. And you are currently on medication?

A: Yes.

Q: Okay. *Do those medication (sic) that you are taking affect your clarity of thinking?*

A: **No.**

Q: Or your memory?

A: Not at all, no.

Q: *Okay. Do you understand the terms of this agreement?*

A: **Yes, I do.**

***

Q: Okay. Do you understand if you had not entered into an agreement you would have a right to go (*sic*) trial. And at a trial you could put on evidence and put forth testimony in a court or make a determination with respect to the equitable distribution of your assets. Do you understand that?

A: **Yes, I do**.

***

Q: Okay. Are you satisfied with my services as of today's date?

A: Yes.

(emphasis supplied).

This colloquy reveals to us that Husband knew what he was doing when he entered into the marriage settlement agreement, especially considering that Husband was represented by counsel prior to and during the settlement proceedings. During the proceedings, neither Husband nor his attorney raised an alarm that Husband might be incompetent to enter into the agreement. As can be seen from the transcript, when Husband's attorney brought up the issue of competency at the beginning of the colloquy, Husband's attorney did not qualify "competency" as Husband attempts to do so here. In fact, Husband's counsel candidly admitted he knew the argument was "a stretch." Our

conclusion is that Husband and his attorney believed that the court previously determined Husband was competent for both criminal and civil purposes.

Of equal significance, is the fact that Husband received an important benefit from Wife with the agreement. Immediately after he received that benefit, he tried to wriggle out of the bargain. We speak of the fact that Wife agreed to postpone the divorce proceedings in order to invoke her spousal privilege in Husband's criminal case, and, essentially, gut the criminal prosecution against him for allegedly assaulting her. Once he got Wife to invoke her privilege and get the charges dismissed, Husband then attempted to gut the bargain by claiming mental incapacity. One could easily conclude that Husband's claimed incapacity was strategic and solely to benefit himself.

We further note that Husband does not allege that he should have been found incompetent at the criminal competency hearing on December 1, 2017; he accepted the court's finding that he was competent. But he claims he lacked the capacity to enter into the MSPA six days later. Under these circumstances, we conclude that the circuit court did not abuse its discretion in denying Husband's motion to reopen the judgment of divorce based on his alleged incapacity.

B. The Court Was Within Its Discretion to Exclude the Reports of a Private Investigator

Husband's second argument is that the circuit court improperly refused to admit the reports of his private investigator. At the hearing, Husband called as a witness John Lopes, a private investigator. Husband and Lopes alleged that the latter's reports revealed that Wife concealed marital assets, unbeknownst to Husband, in at least two separate bank

accounts. At the hearing, Lopes testified that Husband hired him to investigate Wife's "financials." However, Lopes admitted that his private investigating firm did not itself conduct research into Wife's financial accounts; rather, Lopes said that he hired outside vendors to perform this function. According to Lopes, the vendor's research found bank accounts supposedly belonging to the Wife, which presumably were not disclosed prior to or during the drafting of the parties' MPSA.

Critically, Lopes admitted that the vendor did not provide him with the source of this information, and, therefore, he could not verify anything about the accounts beyond what the vendor provided. Lopes also testified that his company "ha[d] no control over" the standards, practices, or conduct of the third-party in gathering the information. Remarkably, the reports did not contain any account records from the banks themselves. Instead, the reports contained only a summary of the alleged bank account, "a portion" of the account number, and the account balance. Lopes admitted he never saw Wife's verified banking records. Ultimately, the court sustained Wife's counsel's objections to the reports as hearsay testimony.

Before this Court, Husband argues that Lopes' private investigative reports were admissible because "[a]n expert may give an opinion based on facts contained in reports, studies, or statements from third parties, if the underlying material is shown to be of the type reasonably relied on by experts in the field." *Lamfalfa v. Hearn*, 457 Md. 350, 354 (2018). Apparently, Husband assumes that Lopes was an expert witness. He was not. To qualify as an expert witness, the court must determine "(1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness

of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony." Md. Rule 5-702. Husband, however, never offered nor qualified the private investigator, Lopes, as an expert witness under Rule 5-702. Accordingly, we conclude that Lopes testified as a lay witness under Rule 5-701.

Maryland Rule 5-701 limits the testimony of a non-expert witness "to those opinions which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Lay opinion testimony is therefore admissible when it is "derived from first-hand knowledge, is rationally connected to the underlying facts, is helpful to the trier of fact, and is not barred by any other rule of evidence." Eric C. Surette & Susan L. Thomas, Md. L. Encyclopedia Evidence, *Lay Opinion Testimony* § 154 (10th ed. September 2020) (citing *Robinson v. State*, 348 Md. 104 (1997)). The lay witness, then, "must be possessed of adequate knowledge regarding the subject matter to which his or her testimony relates." *Id.* at § 155. Admission of such testimony lies within the discretion of the trial court, whose decision shall not be reversed unless it constitutes an abuse of discretion. *Gordon v. State*, 431 Md. 527, 533 (2012); *Brown v. Daniel Realty Co.*, 409 Md. 565, 601 (2009).

At this motions hearing, the judge was the trier of fact. *Steinberg v. Arnold*, 42 Md. App. 711 (1979). When the trial court acts as the trier of fact, its judgment of the evidence will only be set aside if it is clearly erroneous. *State v. Manion*, 442 Md. 419, 431 (2015) (citing *State v. Raines*, 326 Md. 582, 589 (1992)); *see also In re Timothy F.*, 343 Md. 371, 379-80 (1996). As the trier of fact, the court is required to consider all of the evidence before "rendering" its decision, to evaluate or assess witness credibility, and to determine

the weight to be given to the testimony. *Pope v. State*, 284 Md. App. 309 (1979). In this role, the court also possesses the inherent right to disregard testimony of any witness when it is satisfied that the witness is incredible, i.e. not telling the truth, or if the testimony is inherently improbable due to inaccuracy, uncertainty, interest, or bias. *See Steinberg v. Arnold*, 42 Md. App. 711, 712 (1979). The court, then, may accept or reject all, or any portion of the evidence, even if it is uncontradicted. *See Manion*, 442 Md. at 431 (citing *Smith v. State*, 415 Md. 174, 183 (2010)) ("It is simply not the province of the appellate court to determine 'whether the [trier of fact] could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence.'").

We have also explained that in any trial, the judge is also "the legal referee, sometimes determining what he is permitted to consider as a fact finder and what he is not permitted to consider." *Polk v. State*, 183 Md. App. 299, 307 (2008). In that role, "[w]e trust the judge to compartmentalize," *id.* at 307, and properly apply the law to the facts. With this in mind, we conclude that the motions court properly exercised its discretion in declining to admit Lopes' testimony and investigative reports.

To begin, Lopes testified that the reports did not contain any verified statements from Wife's banking institution, nor did he ever see such records. At the hearing, Lopes did not testify that reports such as these are "reasonably relied upon" by others in the field. Rather, he merely testified that he had been using this specific vendor for at least thirty years. He also stated that he was unaware of the standards the vendor uses to research and create these reports. As far as Lopes was concerned, there was no way for him to personally

confirm the information the vendor provided him. With no way to verify such information to be used against Wife for a potential fraud claim, the court acutely observed that this testimony and related reports were inadmissible:

> THE COURT: [O]n the witness stand here today, [Lopes] was not particularly illuminating. Now, part of that was that he couldn't relate to the Court hearsay from some independent third party over whom he indicates he's got no control, in how or when they may have done something, whether it be surreptitiously or illegally to look at accounts. But, I don't have any real evidence based on anything that Mr. Lopes said that [Wife] engaged in any efforts to conceal assets.
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> ***
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> The bottom line is, and I know Counsel has the duty to advance his client's position to the best of his ability but this – the evidence is non-existent of any fraud. I don't think that pleadings are adequate in terms of the allegations of fraud and I don't think the evidence here today was nearly adequate to demonstrate fraud. And in fact, it's non-existent.

It was entirely within the court's discretion to weigh the credibility of the witness and any evidence submitted. Given the court's explanation of why it refused to admit Lopes' testimony, we do not conclude that it abused its discretion in excluding the reports.

C. The Circuit Court Committed No Error in Denying Husband's Request to Reopen the Judgment of Absolute Divorce Based on Fraud

Husband filed his motion to reopen the judgment of divorce invoking Rule 2-534, Motion to Alter or Amend Judgment, and Rule 2-535, Revisory Power. He claimed the basis to reopen the divorce proceedings was that Wife had allegedly committed fraud by concealing assets in previously unknown bank accounts, as we have discussed. Husband's surprising final contention is that the court erred in denying his motion because he claims the court required him to prove fraud when he was not required to do so. He argues that because he filed to reopen the judgment within ten days of the entry of divorce, Maryland

Rule 2-535 controls, therefore, he was not required to show that Wife committed fraud. As we understand it, Husband's argument is completely misplaced.

Maryland Rule 2-534 states:

> [O]n motion of any party filed within ten days after the entry of judgment, the court may open the judgment to receive additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or reasons, may amend the judgment, or may enter a new judgment.

Maryland Rule 2-535(a) permits a court to exercise its revisory power and control over the judgment upon "motion of any party filed within 30 days after entry of the judgment . . . and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534." However, subsection (b) provides an exception, stating that, "[o]n 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." Md. Rule 2-535(b) (emphasis supplied).

Preliminarily, we note that Husband conflates the elements of both rules. Despite Husband's insistence, Rule 2-535 does not require a finding of fraud, mistake, or irregularity in order for a court to exercise its revisory power if a party files a motion after the ten-day deadline specified in Rule 2-534. In other words, Rule 2-535(a) is not conjunctive with Rule 2-535(b). Instead, subsection (b) merely adds to a court's revisory power, stating that the court may invoke this power *at any time* in the case of fraud, mistake, or irregularity; not, as Husband contends, that if a party files a motion after the 10-day mark in Rule 2-534, a Court may then **only** invoke its revisory power in the case of fraud, mistake or irregularity.

It is difficult to understand why Husband argues that the court was not required to find fraud in order to reopen the judgment when he specifically asked for that finding in his motion to reconsider. Of the 30 paragraphs in his motion, 12 reference the court's revisory power under Rule 2-535 and Wife's alleged fraud. For example:

- Para. 19: "That, pursuant to Maryland Rule 2-535, this Court, at any time, may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity."

- Para. 20: "That fraud 'is an act of deliberate deception designed to secure something by taking unfair advantage of someone [. It] includes deceit, though the latter may not reach the gravity of fraud.['"] (citing *Cohen v. Investors Funding Corp.*, 267 Md. 537, 540 (1973)).

- Para. 23: "That, upon information and belief, the Plaintiff holds, and acquired during the time of the parties' marriage, approximately $900,000.00 spread across approximately twenty (20) domestic and foreign accounts throughout various financial institutions unbeknownst to the Defendant."

- Para. 24: "That, upon information and belief, based upon the Plaintiff's representations of her sole assets and income upon entering into the parties' marriage, and throughout the parties' marriage, these assets were created and maintained unbeknownst to the Defendant until after the Court's entry of the parties (*sic*) Judgment of Absolute Divorce."

- Para. 25: "That the Plaintiff **deliberately deceived the Defendant by intentionally failing to disclose the existence of such assets at any time throughout the negotiation and execution of the parties' Martial Property Settlement Agreement or the Plaintiff's testimony, under oath,** at the January 7, 2019 divorce hearing held in this matter."

- Para. 27: "That had the existence of these assets been disclosed to the Defendant prior to the signing of the parties' Marital Property Settlement Agreement, the Defendant would not have entered into the Marital Property Settlement Agreement without the expressed distribution of such assets."

- Para. 28: "That the Plaintiff unfairly took advantage of the Defendant by intentionally failing to disclose the existence of significant marital assets,

depriving Defendant of the opportunity to negotiate the distribution of such assets in this matter."

- Para. 29: "That the Plaintiff **defrauded the Defendant by purposefully failing to disclose substantial marital assets.**" (emphasis supplied).

- Para. 30: "That this Court should, **pursuant to its revisory power under Maryland Rule 2-535**, amend its Judgment of Absolute Divorce . . ."

(emphasis supplied). The remaining counts referenced Rule 2-534 regarding Husband's capacity to contract. With these pleadings in mind, together with the (hearsay) evidence provided by the private investigator, we conclude that the motions court acted within its discretion in making a finding on whether there was sufficient evidence to demonstrate fraud on behalf of the wife.

We review the circuit court's decision to grant or deny a motion to revise a judgment under Rule 2-535(b) for an abuse of discretion. *Peay v. Barnett*, 236 Md. App. 306, 315-16 (2018). However, "[t]he existence of a factual predicate of fraud, mistake or irregularity, necessary to support vacating a judgment under Rule 2-535(b), is a question of law." *Id.* (citing *Wells v. Wells*, 168 Md. App. 382, 394 (2006)). While the denial of such a motion is appealable, "the only issue before the appellate court is whether the trial court erred as a matter of law or abused its discretion in denying the motion." *In re Adoption/Guardianship No. 93321055/CAD*, 344 Md. 458, 475 (1997). Here, the only evidence Husband presented as to Wife's alleged fraud was found to be inadmissible, namely, unverified reports by a non-testifying third party. As we explained elsewhere in this opinion, the court did not abuse its discretion in finding this evidence inadmissible.

Finally, we observe that nowhere in the record does it appear to us that the motions court required Husband make a showing of fraud in order to reopen. Instead, as outlined, the court made two distinct findings: 1) that Husband's capacity was not at issue for purposes of Rule 2-534; and 2) that for purposes of Rule 2-535, Husband did not make a showing that Wife had committed fraud in supposedly secreting funds in hidden bank accounts. We conclude that, given the pleadings and the evidence, the court did not abuse its discretion in considering the issue of fraud and denying Husband's motion to reopen the judgment of divorce on that basis.

JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.