In the Missouri Court of Appeals
Eastern District

DIVISION ONE

VICKI J. SMITH,	)	No. ED108399
	)	
Appellant,	)	Appeal from the Circuit Court
	)	of Lincoln County
	)	14L6-CC00106
vs.	)	05L6-FC00236-02
	)	
	)	
DEAN A. SMITH,	)	Honorable Thomas J. Frawley
	)	
Respondent.	)	Filed: March 30, 2021

Vicki J. Smith ("Wife") appeals the trial court's August 26, 2019 judgment ("August 2019 judgment") entered in favor of Dean A. Smith ("Husband") on Husband's claim for equitable relief. The August 2019 judgment relieved Husband from his obligation under the parties' May 2007 dissolution judgment to pay any monies owed on a Bank of America credit card in Husband's individual name; entered judgment in favor of Husband and against Wife in the total amount of $50,660.79; and ordered Wife to pay Husband $15,000.00 in attorney's fees. Because Husband's claim for equitable relief was barred by the doctrine of res judicata, we reverse the August 2019 judgment and remand to the trial court for dismissal of Husband's claim.[1]

[1] We deny Husband's motion for attorney's fees on appeal, which was taken with the case.

I. BACKGROUND

This case involves whether, *inter alia*, Husband or Wife is obligated to pay monies owed on a Bank of America credit card in Husband's individual name. As explained below, two trial judges in the Circuit Court of Lincoln County made inconsistent rulings as to this issue; the Honorable Dan Dildine ("Judge Dildine") found Husband has an obligation to pay monies owed on the Bank of America credit card, whereas the Honorable Thomas J. Frawley ("Judge Frawley" or "the trial court") found Wife has an obligation to pay such monies owed.

The parties were married on July 31, 1982, and three children were born of the marriage. The parties then separated on or about February 1, 2005. On October 14, 2005, Wife filed a petition for dissolution of marriage. The case subsequently involved a lengthy procedural posture consisting of, (A) October 2005 to May 2007 dissolution proceedings before Judge Dildine; (B) proceedings on Husband's December 2009 motion to modify, motion for contempt, and petition for unjust enrichment before Judge Dildine; and (C) proceedings on Husband's August 2014 claim for equitable relief before Judge Frawley leading up to the instant appeal.

A. Relevant Portions of the October 2005 to May 2007 Dissolution Proceedings Before Judge Dildine

1. Initial Facts Regarding the Credit Card at Issue in this Appeal

During the parties' marriage, Husband opened an MBNA credit card account in his individual name. On separate dates in 2005, Wife and Husband each filed a statement of property listing the credit card as having a $0 balance. Neither party amended his or her statement of property at any time during the dissolution proceedings.

At some point during the dissolution proceedings, the MBNA credit card account was taken over by Bank of America ("the Bank of America credit card"). Although the Bank of America credit card was in Husband's individual name only, Wife was authorized to write checks on the account. On January 1, 2007, the Bank of America credit card had a $0 balance.

On January 25 and April 24, 2007, and without Husband's knowledge, Wife wrote four checks on the Bank of America credit card account totaling approximately $30,000.00.[2]

2. Judge Dildine's Orders and Husband's Failure to Comply with Such Orders and Discovery

On March 10, 2006, Judge Dildine entered a pendente lite ("PDL") order requiring Husband to pay Wife the sum of $771.00 per month beginning on April 10, 2006 for child support and the sum of $5,000.00 per month in temporary maintenance beginning April 10, 2006. Husband failed to comply with the PDL order. Accordingly, on June 13, 2006, Judge Dildine entered an order providing for an income withholding to be effective against Husband for "$5771.00 per month in child support/maintenance, and an additional $2885.50 per month for 2.43 months to defray arrearages." (emphasis omitted).

Judge Dildine also entered multiple orders against Husband for failing to comply with discovery during the pendency of the dissolution proceedings. On September 18, 2006, Judge Dildine entered an order granting Wife's motion to compel execution of a release for records. Then, on January 16, 2007, Judge Dildine entered an order granting Wife's motion to compel supplemental responses to five specific requests in Wife's first request for production of documents and ordering Husband to supplement such responses on or before February 10, 2007. Additionally, because Husband failed to comply with the discovery deadline in the January 16, 2007 order, Judge Dildine entered an order on February 20, 2007 granting Wife's motion for sanctions and motion to compel further discovery responses, which, *inter alia*, ordered Husband to pay Wife $500.00 in attorney's fees as a sanction.

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[2] Wife wrote three checks on the bank of America credit card account on January 25, 2007, (1) a check to herself for the amount of $19,000.00 with "legal expenses" written in the memo line; (2) a check to her attorney in the amount of approximately $5,896.00 with "balance due on Jan 07" written in the memo line; and (3) another check to her attorney in the amount of $3,000.00 with "trust account" written in the memo line. Wife then wrote a final check on the Bank of America credit card account on April 24, 2007 in the amount of $2,000.00 with "family expenses" written in the memo line.

3. The Parties' Settlement Agreement and Dissolution Judgment

On March 2, 2007, and after several hours of negotiation with counsel and parties present, the parties reached a settlement agreement on the record. Among other things, the parties agreed Husband would be responsible for all credit cards and their balances in his individual name, and in return, his child support and maintenance arrearages would be eliminated. A marital settlement agreement ("Marital Settlement Agreement") reflected terms reached by the parties on the record in March 2007, and the parties' signed the Marital Settlement Agreement on May 15, 2007.

Judge Dildine signed and entered the dissolution judgment on May 15, 2007, and the parties' Marital Settlement Agreement was incorporated into the judgment. The Marital Settlement Agreement provided Wife would assume and pay all credit cards in her individual name and would pay her own attorney's fees and that Husband would assume and pay all credit cards in his individual name and pay his own attorney's fees. The Marital Settlement Agreement also provided, (1) Wife agreed Husband was current in his maintenance and child support obligations and absolved him of all arrearage and interest as of May 15, 2007; (2) each party released and discharged the other from any and all claims, demands, causes of action, whether in law or in equity, that they may have against the other; (3) the parties' acknowledged there had been limited discovery undertaken with respect to the case and each party acknowledged and assumed any loss which may be occasioned due to the fact that complete discovery was not had by the parties; and (4) said acknowledgment further stated the attorneys had advised their clients of the risk that exists when complete discovery is not had and the clients thereby stated they knowingly and willingly assumed the risk and held each attorney harmless with respect to any cause of action. Finally, the Marital Settlement Agreement provided that commencing June 1,

2007, Husband would pay Wife $1,000.00 per month in maintenance and $3,000.00 per month in child support for the parties' two unemancipated children.

B. Relevant Portions of the Proceedings on Husband's December 2009 Motion to Modify, Motion for Contempt, and Petition for Unjust Enrichment Before Judge Dildine

On December 22, 2009, Husband filed a motion to modify, motion for contempt, and petition for unjust enrichment ("Husband's 2009 Motion"). Husband's 2009 Motion requested, *inter alia*, the termination or modification of his obligation to pay maintenance; a modification of his obligation to pay child support; and relief on the approximately $30,000.00 Bank of America credit card debt resulting from Wife writing checks during the dissolution proceedings on the basis that Husband was unaware of the debt. With respect to the Bank of America credit card debt, Husband's 2009 Motion requested a court order requiring Wife to reimburse Husband for amounts he paid toward the Bank of America credit card and a claim for unjust enrichment. Husband also alleged he thought the Bank of America credit card was closed and he became aware of Wife's credit card use after the parties' dissolution judgment was entered.

On August 2, 2010, Wife filed a Motion to Dismiss Husband's 2009 Motion ("Wife's 2010 Motion to Dismiss"). Wife asserted Husband's 2009 Motion should be dismissed because Husband had unclean hands in that Husband did not pay Wife maintenance and child support in accordance with the terms of the dissolution judgment and Husband's total arrears were over $30,000.00. Wife also claimed Husband's 2009 Motion should be dismissed because Husband released all potential claims, including tort claims, against Wife in the parties' Marital Settlement Agreement, and because Husband agreed in the Marital Settlement Agreement to assume any loss due to his failure to do little, if any, discovery in the dissolution proceedings.

On September 21, 2010, Judge Dildine conducted a hearing on Wife's 2010 Motion to Dismiss. Evidence adduced at the hearing demonstrated Husband's total arrears for maintenance

and child support were $38,634.82 (consisting of a total maintenance arrearage of $19,393.49 and a total child support arrearage of $19,241.33).

Husband testified at the evidentiary hearing that he learned there was a debt on the Bank of America credit card after the parties' divorce in July 2007, and he changed the address on the credit card from Wife's address in Missouri to his address in Florida. Husband also testified he did not file a motion to set aside the dissolution judgment at the time he learned of the Bank of America credit card debt in July 2007. Husband claimed he did not file such a motion because he was on active duty in the military "based out of Tampa, Florida," and "had multiple deployments going to Iraq and Afghanistan"; however, the only specific evidence of Husband's overseas deployments was that he had an eleven-month deployment in 2005 and a seven-month deployment in 2006.

Wife testified at the hearing on her 2010 Motion to Dismiss that although she did not have any direct negotiations with Husband on the day of the settlement hearing on March 2, 2007 because the attorneys negotiated the settlement, it was her understanding the Bank of America credit card balance was an exchange of debts for the maintenance and child support arrears that were owed by Husband, which was part of what factored into her negotiation position during the settlement process. On cross-examination, Husband's attorney asked Wife about all of the checks that were written on the Bank of America credit card account, and she testified some of the money from the checks went to legal fees and some was used for the parties' children. Wife testified she never misrepresented the Bank of America credit card debt to Husband, Husband never asked her about it, and Husband did not do any discovery during the dissolution proceedings. Wife also testified she was never served with a motion to set aside the parties' dissolution judgment.

At the conclusion of the evidentiary hearing on Wife's 2010 Motion to Dismiss, Wife's attorney argued Husband's 2009 Motion should be dismissed on the basis of unclean hands, the doctrine of release, and because Husband could have filed a motion to set aside the parties' dissolution judgment within one year of it being entered but Husband never did. With respect to Wife's claim asserting Husband had unclean hands, Wife's attorney argued that, *inter alia*, during the dissolution proceedings Husband failed to comply with Judge Dildine's orders, including discovery orders.

On September 21, 2010, Judge Dildine entered a judgment granting Wife's 2010 Motion to Dismiss Husband's 2009 Motion and ordering Husband to pay Wife $2,000.00 in attorney's fees ("Judge Dildine's 2010 judgment"). Judge Dildine's 2010 judgment did not specify whether the dismissal of Husband's 2009 Motion was with or without prejudice.

Nevertheless, Judge Dildine's 2010 judgment specifically found the evidence at the hearing on Wife's 2010 Motion to Dismiss established that, (1) "[Husband] had failed to abide by the [c]ourt's prior orders [in the dissolution judgment] as to child support and as to maintenance, being in arrears by more than $9,600.00 as to [the parties' minor daughter], that he was in arrears more than $9,600.00 as to [the parties' minor son], and that he was in arrears more than $19,000.00 as to his maintenance due to [Wife]"; (2) "[Husband] during the time of failing to abide by the [c]ourt's orders had the ability to comply . . . and made the decision not to comply"; (3) "[b]y July of 2007, [Husband] was aware of the balance of [the Bank of America credit card account] that he had accepted as part of the [M]arital [S]ettlement [A]greement, exceeding what he expected it to be. However, no action was filed by [Husband] until [Husband's 2009 Motion]"; (4) "the parties' [M]arital [S]ettlement [A]greement . . . included a release and discharge of any and all claims, demands, causes of actions, etc. that either party had against the other"; and (5) "[during the dissolution proceedings] [Husband] had done little

discovery, and had avoided full compliance with [Wife's] discovery requests." In sum, Judge Dildine's 2010 judgment effectively found that Husband has an obligation to pay monies owed on the Bank of America credit card.

C. Relevant Portions of the Proceedings on Husband's August 2014 Claim for Equitable Relief Before Judge Frawley Leading Up to the Instant Appeal

On August 22, 2014, Husband filed a petition asserting a claim for equitable relief. In this claim, Husband alleged that during the dissolution proceedings and without Husband's knowledge or authorization, Wife drafted four checks on the Bank of America credit card totaling approximately $30,000.00. Husband requested a judgment in his favor and against Wife for all amounts he paid on the Bank of America credit card debt as a result of the four checks written by Wife, and for an order requiring Wife to pay all remaining sums on the debt for the four checks, for interest, and for attorney's fees. Subsequently, Wife filed a motion to dismiss Husband's claim for equitable relief on the grounds the claim was barred under the doctrine of res judicata because "[Husband] has previously litigated his claim regarding these issues against [Wife] [before Judge Dildine]."

On October 14, 2014, Husband's claim for equitable relief was consolidated in a motion to modify action that was already pending. On November 4, 2014, Husband filed an amended motion to modify and to abate child support, determine child support arrears, and for equitable relief which again included counts pertaining to the Bank of America credit card debt.

There were several hearings held before Judge Frawley regarding Husband's 2014 pleadings. Initial judgments were entered on October 20, 2016, on February 24, 2017, and on June 13, 2017; none of these aforementioned judgments made any findings on the Bank of America credit card debt, and all of the judgments provided the parties' dissolution judgment remained in full force and effect on this issue.

On December 1, 2017, Judge Frawley held a hearing on Husband's claim for equitable relief regarding the issue of the Bank of America credit card debt. Husband and Wife both testified at the hearing. Husband effectively testified that Wife concealed the Bank of America credit card debt from Husband by failing to mail the Bank of America credit card statements to Husband during the dissolution proceedings; re-activating the account without Husband's knowledge; waiting to change the address on the Bank of America credit card until after the dissolution judgment was entered; and failing to update her financial disclosures with the court after she wrote the checks resulting in the Bank of America credit card debt.

Subsequently, Judge Frawley entered a judgment on June 4, 2018 in favor of Husband on his claim of equitable relief ("June 2018 judgment"). The trial court's June 2018 judgment found that, *inter alia*, Husband established Wife committed extrinsic fraud with respect to her alleged actions and inactions concealing the Bank of America credit card debt from Husband. The trial court also found a hearing should be held to determine Husband's damages.

Wife filed a motion to reconsider the trial court's June 2018 judgment, specifically alleging Husband's claim for equitable relief was barred by res judicata and that Husband did not establish Wife committed extrinsic fraud. Judge Frawley denied Wife's motion to reconsider and held a hearing on damages on June 3, 2019.

Thereafter, on August 26, 2019, Judge Frawley entered the August 2019 judgment Wife appeals from in the instant case. The trial court's August 2019 judgment again found in favor of Husband on his claim for equitable relief, specifically finding Husband established Wife committed extrinsic fraud in obtaining the parties' dissolution judgment incorporating the Marital Settlement Agreement because of her alleged actions and inactions concealing the Bank of America credit card debt. The trial court also found Husband could obtain relief on the basis of extrinsic fraud because he showed an absence of fault, neglect, or inattention to the case in

that he repeatedly litigated his claim pertaining to the Bank of America credit card debt following the May 2007 dissolution judgment, including in Husband's 2009 Motion before Judge Dildine and in Husband's 2014 claim for equitable relief before Judge Frawley.

The trial court's August 2019 judgment also relieved Husband from his obligation under the parties' May 2007 dissolution judgment to pay any monies owed on the Bank of America credit card in Husband's individual name; entered judgment in favor of Husband and against Wife in the total amount of $50,660.79; and ordered Wife to pay Husband $15,000.00 in attorney's fees.

Wife then filed a motion for a new trial and/or to amend the trial court's August 2019 judgment, which the trial court granted in part and denied in part. The trial court granted Wife's post-trial motion to the extent the court clarified Wife's responsibility to pay the outstanding balance of the Bank of America credit card debt to Husband was part of the total amount awarded to Husband in the August 2019 judgment. The trial court denied Wife's post-trial motion to the extent it otherwise requested the August 2019 judgment to be amended and to the extent it requested a new trial. This appeal followed.

II. DISCUSSION

In Wife's first point on appeal and in sub-part one of Wife's second point on appeal, she asserts the trial court's August 2019 judgment is erroneous because Husband's claim for equitable relief was barred by the doctrine of res judicata and the trial court erred in finding Husband could establish a successful extrinsic fraud claim against Wife. For the reasons discussed below, we agree.[3] Moreover, because Wife's arguments are related, we will consider them together. *See, e.g., Walker v. Walker*, 280 S.W.3d 634, 636 (Mo. App. W.D. 2009) ("res

[3] Wife raises a total of three points on appeal. Sub-part two of Wife's second point on appeal and Wife's third point on appeal contend the trial court's August 2019 judgment is erroneous for reasons in addition to those asserted in her first point on appeal and sub-part one of her second point on appeal ("Wife's additional arguments"); however, because Wife's first point on appeal and sub-part one of her second point on appeal are dispositive, we do not reach Wife's additional arguments.

judicata . . . [is] inapplicable to bar a claim to set aside a judgment obtained by extrinsic fraud"); *Vinson v. Vinson*, 725 S.W.2d 121, 124 (Mo. App. E.D. 1987) ("[r]es judicata notwithstanding, a prior judgment can be set aside if it can be shown it was obtained by extrinsic fraud").

A. Standard of Review

Our review of a judgment in a court-tried case is governed by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). *Williams v. Zellers*, 611 S.W.3d 357, 364 (Mo. App. E.D. 2020). Accordingly, our Court will affirm the trial court's judgment unless it is not supported by substantial evidence, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law. *Id*.

B. Relevant Law

"Res judicata, also known as claim preclusion, bars the reassertion of a claim or cause of action that has been previously adjudicated in a proceeding between the same parties or those in privity with them." *Boehlein v. Crawford*, 605 S.W.3d 135, 139 (Mo. App. E.D. 2020); *see also Dunn v. Board of Curators of University of Missouri*, 413 S.W.3d 375, 377 (Mo. App. E.D. 2013) ("[r]es judicata is a common law doctrine that precludes parties from contesting matters they already had a full and fair opportunity to litigate") (citing *U.S. Fidelity & Guar. Co. v. Commercial Union Ins. Co.*, 943 S.W.2d 640, 641 (Mo. banc 1997)). The doctrine of res judicata applies "not only to claims and issues upon which the court was required by the pleadings and proof to form an opinion and pronounce judgment, but to every claim properly belonging to the subject matter of the litigation and which the parties, exercising reasonable diligence, might have brought forward at the time." *Boehlein*, 605 S.W.3d at 139 (citing *King Gen. Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 501 (Mo. banc 1991)); *see also Xiaoyan Gu v. Da Hua Hu*, 447 S.W.3d 680, 687 (Mo. App. E.D. 2014) (similarly providing). "The purpose of this rule is to protect individuals from the

burden of litigating multiple lawsuits, to promote judicial economy, and to minimize the possibility of inconsistent decisions." *Xiaoyan Gu*, 447 S.W.3d at 687.

"[R]es judicata applies only where a prior determination has been made on the merits[.]" *Boehlein*, 605 S.W.3d at 141 (citing *Denny v. Mathieu*, 452 S.W.2d 114, 118-19 (Mo. banc 1970)). A trial court's dismissal without prejudice may be considered a determination on the merits as to issues that are litigated by the parties and decided by the court. *Woods v. Mehlville Chrysler-Plymouth*, 198 S.W.3d 165, 170 (Mo. App. E.D. 2006) (citing *Sexton v. Jenkins & Associates, Inc.*, 152 S.W.3d 270, 273 (Mo. banc 2004)). Accordingly, even if a claim was dismissed without prejudice, the doctrine of res judicata may preclude a party from re-filing a cause of action in certain situations, including when the party's new cause of action arises from the same substantial facts as those previously alleged. *See Dunn*, 413 S.W.3d at 377 ("regardless of whether a case was dismissed without prejudice, the doctrine of res judicata precludes a plaintiff from re-filing a petition that was dismissed for failing to state a claim when it relies on the same substantial facts as those previously alleged"); *see also Phox v. Boes*, 481 S.W.3d 920, 921-22 (Mo. App. W.D. 2016) ("[i]n certain situations . . . [ ] dismissals [without prejudice] may effectively 'preclude a party from bringing another action for the same cause and may be res judicata of what the judgment actually decided'") (quoting *Doe v. Visionaire Corp.*, 13 S.W.3d 674, 676 (Mo. App. E.D. 2000)).

Nevertheless, res judicata does not apply to a party's claim to set aside a prior judgment obtained by extrinsic fraud. *Walker*, 280 S.W.3d at 636; *Vinson*, 725 S.W.2d at 124. In other words, the doctrine of res judicata does not apply to a successful extrinsic fraud claim. *See id*. "Extrinsic fraud refers to the fraudulent procurement of a judgment; therefore, the fraud must relate, not to the propriety of the judgment itself, but to the manner in which the judgment was obtained." *Vinson*, 725 S.W.2d at 124. "The fraud must have been extrinsic or collateral to the

matters which either were or could have been presented and adjudicated in the original proceeding, and not merely intrinsic in the sense of having pertained to the merits of the cause upon which the judgment of the court was rendered." *Id*. (quotation omitted).

Although the classification of an alleged fraud as extrinsic or intrinsic can be difficult, prior Missouri cases provide guidance. *Vinson*, 725 S.W.2d at 124 (citing *Fadler v. Gabbert*, 63 S.W.2d 121, 130 (Mo. 1933)); *see also T.B. III v. N.B.*, 478 S.W.3d 504, 509 (Mo. App. E.D. 2015). "Fraud is extrinsic when it induces a party to default or consent to a judgment."[4] *Reimer v. Hayes*, 365 S.W.3d 280, 283 (Mo. App. W.D. 2012) (quotation omitted); *see also T.B. III*, 478 S.W.3d at 509 (similarly holding). On the other hand, fraud is intrinsic "when a party knowingly uses perjured testimony or otherwise fabricates evidence." [5] *Reimer*, 365 S.W.3d at 283. Fraud is also intrinsic when one party conceals evidence pertaining to an issue in the case and underlying judgment. *See Sharpe v. Sharpe*, 243 S.W.3d 414, 416-17 (Mo. App. E.D. 2007); *In re Marriage of Harrison*, 734 S.W.2d 934, 939-40 (Mo. App. S.D. 1987) (citing *Daffin v. Daffin*, 567 S.W.2d 672, 677-78 (Mo. App. 1978) (superseded by statute on other grounds)).

A party seeking to establish extrinsic fraud occurred must do so by clear, strong, cogent, and convincing evidence. *Vinson*, 725 S.W.2d at 124. Additionally, in order for a party to obtain relief on the basis of extrinsic fraud, the complaining party must show the absence of fault, neglect, or inattention to the case. *T.B. III*, 478 S.W.3d at 509; *Vinson*, 725 S.W.2d at 124; *see also Keithley v. Shelton*, 421 S.W.3d 502, 507 (Mo. App. S.D. 2013) (similarly holding and

[4] Examples of conduct constituting extrinsic fraud include the failure of a guardian ad litem to properly represent his ward in a dissolution proceeding, a husband's representations to his wife that his attorney would look out for her interests and she did not need her own attorney, an action by one party which prevents the other party from appearing in court, a party's false promise of a compromise that keeps the opposing party away from court, and "actions whereby an attorney 'sells out' his client's interest to the other side or connives to bring about his client's defeat." *Walker*, 280 S.W.3d at 636 n.2 (citing and quoting *Vinson*, 725 S.W.2d at 124).

[5] Examples of conduct constituting intrinsic fraud include a party making "false averments in a divorce petition, false statements in an affidavit, and false testimony." *Reimer*, 365 S.W.3d at 283 (quotation omitted); *see also Miller v. Hubbert*, 804 S.W.2d 819, 821 (Mo. App. E.D. 1991); *Vinson,* 725 S.W.2d at 124.

also finding "failure of the complaining party to demonstrate [he] was free from fault, neglect, or inattention is fatal to the action") (quotation omitted).

C. Analysis

In this case, Wife argues the trial court's August 2019 judgment is erroneous because Husband's claim for equitable relief was barred by the doctrine of res judicata and the trial court erred in finding Husband established Wife committed extrinsic fraud in obtaining the parties' dissolution judgment incorporating the Marital Settlement Agreement. Accordingly, and consistent with the case law set forth in the preceding subsection of this opinion, we must consider, (1) the application of the general principles of res judicata to the facts and procedural posture of this case; and (2) whether the extrinsic fraud exception to the doctrine of res judicata applies to the facts and procedural posture of this case.

1. The Application of the General Principles of Res Judicata to the Facts and Procedural Posture of this Case

In this case, Husband filed claims pertaining to the Bank of America credit card debt in Husband's 2009 Motion before Judge Dildine and Husband's 2014 Petition before Judge Frawley. Both claims requested relief on the approximately $30,000.00 in Bank of America credit card debt resulting from Wife writing checks during the dissolution proceedings on the basis that Husband was unaware of the debt at the time the parties' dissolution judgment and accompanying Marital Settlement Agreement was entered. As previously stated, Judge Dildine and Judge Frawley made inconsistent rulings as to whether Husband or Wife has an obligation to pay monies owed on the Bank of America credit card.

First, after a hearing, Judge Dildine's 2010 judgment granted Wife's 2010 Motion to Dismiss Husband's 2009 Motion alleging, *inter alia*, an unjust enrichment claim based on the Bank of America credit card debt. At the hearing, Wife and Husband both testified and evidence was presented. Additionally, Husband's attorney cross-examined Wife regarding, *inter alia*, all

of the checks she wrote on the Bank of America credit card account. Finally, Judge Dildine's 2010 judgment made several findings on the merits of Husband's 2009 Motion based on the evidence at the hearing, and the judgment effectively found that Husband has an obligation to pay monies owed on the Bank of America credit card.

Subsequently, Judge Frawley's August 2019 judgment found in favor of Husband on his 2014 claim for equitable relief based on the Bank of America credit card debt. The trial court's August 2019 judgment relieved Husband from his obligation under the parties' May 2007 dissolution judgment to pay any monies owed on the Bank of America credit card in Husband's individual name; entered judgment in favor of Husband and against Wife in the total amount of $50,660.79; and ordered Wife to pay Husband $15,000.00 in attorney's fees.

Judge Dildine's 2010 judgment did not specify whether the dismissal of Husband's 2009 Motion was with or without prejudice. Accordingly, it is deemed to be without prejudice. *See* Missouri Supreme Court Rule 67.03 (2010) ("[a]ny involuntary dismissal shall be without prejudice unless the court in its order for dismissal shall otherwise specify"); *Meissner v. Schnettgoecke*, 427 S.W.3d 864, 866 n.2 (Mo. App. E.D. 2014) ("generally, if a dismissal does not specifically state it is with prejudice, it is deemed to be without prejudice").

Although Judge Dildine's 2010 judgment is considered to be a dismissal without prejudice, we find the judgment was a determination on the merits as to Husband's claim that he was entitled to relief on the approximately $30,000.00 in Bank of America credit card debt resulting from Wife writing checks during the dissolution proceedings. This is because Husband had a full and fair opportunity to litigate his claim, the claim was litigated by the parties, and the claim was decided by the court. *See Woods*, 198 S.W.3d at 170 (a trial court's dismissal without prejudice may be considered a determination on the merits as to issues that are litigated by the parties and decided by the court) (citing *Sexton*, 152 S.W.3d at 273).

We also find Husband's new cause of action filed in 2014 before Judge Frawley, under a new theory of equitable relief, arose from the same substantial facts as those previously alleged in Husband's 2009 Motion before Judge Dildine. Specifically, Husband alleged in both his 2009 and 2014 actions that Wife wrote approximately $30,000.00 in checks during the dissolution proceedings on the Bank of America credit card, and Husband was unaware of the debt at the time the parties' dissolution judgment and accompanying Marital Settlement Agreement was entered.

In sum, Judge Dildine's 2010 judgment was a determination on the merits as to Husband's claim, Husband had a full and fair opportunity to litigate his claim, and Husband's 2014 claim arose from the same substantial facts as those previously alleged by Husband in 2009. Under these circumstances, res judicata barred the reassertion of Husband's claim against Wife in 2014 so long as Husband did not establish a successful extrinsic fraud claim against Wife. *See id*.; *Boehlein*, 605 S.W.3d at 139, 141; *Dunn*, 413 S.W.3d at 377; *Walker*, 280 S.W.3d at 636; *Vinson*, 725 S.W.2d at 124; *see also State ex rel. City of Blue Springs, Missouri v. Schieber*, 343 S.W.3d 686, 688 (Mo. App. W.D. 2011) ("[s]o long as the underlying facts are the same, res judicata bars re-litigation of the matter whether upon the same or different cause of action, claim, demand, ground or theory." (quotation, internal quotations, and emphasis omitted).

2. Whether the Extrinsic Fraud Exception to the Doctrine of Res Judicata Applies to the Facts and Procedural Posture of this Case

As previously stated, the doctrine of res judicata does not apply to a successful extrinsic fraud claim. *See Walker*, 280 S.W.3d at 636; *Vinson*, 725 S.W.2d at 124. In this case, the trial court found in its August 2019 judgment that Husband established a successful extrinsic fraud claim against Wife because, (1) Husband demonstrated Wife committed extrinsic fraud in obtaining the parties' dissolution judgment incorporating the Marital Settlement Agreement because of her alleged actions and inactions concealing the Bank of America credit card debt;

and (2) Husband showed an absence of fault, neglect, or inattention to the case in that he repeatedly litigated his claim pertaining to the Bank of America credit card debt following the May 2007 dissolution judgment, including in Husband's 2009 Motion before Judge Dildine and in Husband's 2014 claim for equitable relief before Judge Frawley.

We hold the trial court erred in making both of the aforementioned findings. First, fraud is considered to be *intrinsic* when one party conceals evidence pertaining to an issue in the case and part of an underlying judgment. *See Sharpe*, 243 S.W.3d at 416-17 (holding a husband's concealment of property in dissolution action did not constitute extrinsic fraud because property distribution was an issue in the case); *Harrison*, 734 S.W.2d at 939-40 (finding a husband's concealment of a military pension from the trial court in a dissolution action was intrinsic because the division of marital property was a part of the dissolution judgment) (citing *Daffin*, 567 S.W.2d at 677-78) (superseded by statute on other grounds)); *see also Walker*, 280 S.W.3d at 639 (finding a wife's concealment of the fact her husband was not the biological father of the child in a dissolution action did not constitute extrinsic fraud because such evidence went to the merits of the dissolution action) (citing *Miller v. Hubbert*, 804 S.W.2d 819, 820-21 (Mo. App. E.D. 1991) and *K.E.A. v. T.A.A.*, 765 S.W.2d 389, 390-91 (Mo. App. S.D. 1989)). Here, any actions and inactions committed by Wife allegedly concealing the Bank of America credit card debt from Husband in the dissolution action constituted intrinsic fraud because the division of property and debt was an issue in the dissolution proceedings and was part of the underlying dissolution judgment incorporating the parties' Marital Settlement Agreement. *See id*. Therefore, the trial court erred in finding Wife committed extrinsic fraud on this basis.

Second, the trial court erred in finding Husband could obtain relief on an extrinsic fraud claim because Husband failed to show he was free of fault, neglect, or inattention to the proceedings. *See T.B. III*, 478 S.W.3d at 509; *Vinson*, 725 S.W.2d at 124; *see also Keithley*, 421

S.W.3d at 507. It is true that, as found by the trial court, Husband repeatedly litigated his claim pertaining to the Bank of America credit card debt following the dissolution judgment. Nevertheless, we find Husband's failure to show an absence of fault, neglect, or inattention during the pendency of the dissolution proceedings and after the dissolution judgment was entered is fatal to his claim of extrinsic fraud.

As found in Judge Dildine's 2010 judgment, (1) "[Husband] had failed to abide by the [c]ourt's prior orders [in the dissolution judgment] as to child support and as to maintenance, being in arrears by more than $9,600.00 as to [the parties' minor daughter], that he was in arrears more than $9,600.00 as to [the parties' minor son], and that he was in arrears more than $19,000.00 as to his maintenance due to [Wife]"; (2) "[Husband] during the time of failing to abide by the [c]ourt's orders had the ability to comply . . . and made the decision not to comply"; (3) "[b]y July of 2007, [Husband] was aware of the balance of [the Bank of America credit card account] that he had accepted as part of the [M]arital [S]ettlement [A]greement, exceeding what he expected it to be. However, no action was filed by [Husband] until [Husband's 2009 Motion]"; (4) "the parties' [M]arital [S]ettlement [A]greement . . . included a release and discharge of any and all claims, demands, causes of actions, etc. that either party had against the other"; and (5) "[during the dissolution proceedings] [Husband] had done little discovery, and had avoided full compliance with [Wife's] discovery requests." The aforementioned findings are supported by the record in this case, including but not limited to, the transcript of the 2010 hearing before Judge Dildine and the dissolution judgment incorporating the Marital Settlement Agreement.

Moreover, Husband's failure to demonstrate he was free from fault, neglect, or inattention during the pendency of the dissolution proceedings and after the dissolution judgment was entered is fatal to his extrinsic fraud claim against Wife. *See Lin v. Lin*, 834 S.W.2d 224,

227-28 (Mo. App. S.D. 1992) (holding a wife's claim that her husband committed extrinsic fraud by failing to disclose the value of certain property during the course of negotiating the parties' property settlement should not be allowed because the wife did not show her absence of fault, neglect, or inattention to the dissolution judgment incorporating a property settlement where she knowingly took risks by proceeding without counsel); *see also Keithley*, 421 S.W.3d at 507; *Sharpe*, 243 S.W.3d at 417 (citing *In re Marriage of Brown*, 703 S.W.2d 59 (Mo. App. E.D. 1985) for the proposition that "[an] equity proceeding cannot be used to obtain another hearing on matters that were or could have been brought at trial, e.g., when a party later finds further evidence of truth or falsity or failed to litigate such matters in the original case").

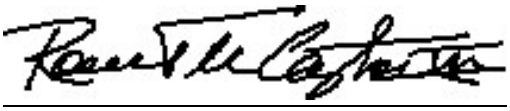
In sum, the extrinsic fraud exception to the doctrine of res judicata does not apply to the facts and procedural posture of this case.

3. Conclusion as to Wife's First Point on Appeal and Sub-Part One of Wife's Second Point on Appeal

Based on the foregoing, the trial court's August 2019 judgment is erroneous because Husband's claim for equitable relief was barred by the doctrine of res judicata. Accordingly, we reverse the trial court's August 2019 judgment which relieved Husband from his obligation under the parties' May 2007 dissolution judgment to pay the outstanding balance of a Bank of America credit card in Husband's individual name; entered judgment in favor of Husband and against Wife in the total amount of $50,660.79; and ordered Wife to pay Husband $15,000.00 in attorney's fees. *See Johnson Controls, Inc. v. Trimmer*, 466 S.W.3d 585, 587, 595-596 (Mo. App. W.D. 2015) (similarly reversing a decision on a claim barred by the doctrine of res judicata). Additionally, we remand to the trial court for dismissal of Husband's claim for equitable relief. *See id.* at 596 (similarly remanding for dismissal of a claim barred by the doctrine of res judicata). Wife's first point on appeal and sub-part one of Wife's second point on appeal are granted.

III. CONCLUSION

The trial court's August 2019 judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.



ROBERT M. CLAYTON III, Judge

Colleen Dolan, P.J., and
Mary K. Hoff, J., concur.