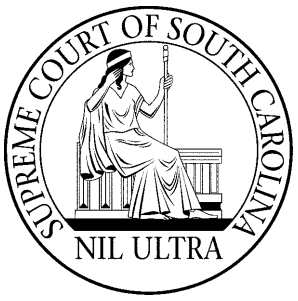

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 33
August 26, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

In the Matter of Charles L. Anderson, Petitioner

Appellate Case No. 2019-000062

ORDER

By opinion dated September 28, 2016, this Court suspended Petitioner from the practice of law in South Carolina for a period of two years, retroactive to the date of January 14, 2014. *In re Anderson*, 418 S.C. 48, 791 S.E.2d 285 (2016). Petitioner filed a petition for reinstatement pursuant to Rule 33, RLDE, Rule 413, SCACR. Following a hearing, the Committee on Character and Fitness recommended the Court reinstate Petitioner to the practice of law.

We find Petitioner has met the requirements of Rule 33(f), RLDE, Rule 413, SCACR. Accordingly, we grant Petitioner's petition and reinstate him to the practice of law in this state.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
August 24, 2020

The Supreme Court of South Carolina

In the Matter of John Michael Bosnak, Responsdent.

Appellate Case No. 2019-001629

ORDER

By opinion dated April 19, 2017, Petitioner was definitely suspended from the practice of law for a period of one year, retroactive to February 2, 2016, the date of his interim suspension. *In re Bosnak*, 419 S.C. 520, 799 S.E.2d 306 (2017). Petitioner filed a petition for reinstatement pursuant to Rule 33, RLDE, Rule 413, SCACR. Following a hearing, the Committee on Character and Fitness recommended the Court reinstate Petitioner to the practice of law.

We find Petitioner has met the requirements of Rule 33(f), RLDE, Rule 413, SCACR. Accordingly, we grant Petitioner's petition and reinstate him to the practice of law in this state.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
August 24, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Fairfield Waverly, LLC, Respondent,

v.

Dorchester County Assessor, Appellant.

GS Windsor Club, LLC, Respondent,

v.

Dorchester County Assessor, Appellant.

Appellate Case No. 2017-000569

Appeal From The Administrative Law Court
S. Phillip Lenski, Administrative Law Judge

Opinion No. 5769
Heard February 11, 2020 – Filed August 26, 2020

AFFIRMED

Andrew T. Shepherd, of Hart Hyland Shepherd, LLC, of Summerville, and John G. Frampton, of St. George, both for Appellant.

Burnet Rhett Maybank, III, and James Peter Rourke, both of Nexsen Pruet, LLC, of Columbia, for Respondents.

HEWITT, J.: This case concerns section 12-37-3135 of the South Carolina Code (2014). That statute allows a twenty-five percent property tax exemption when there is an "Assessable Transfer of Interest" of certain types of real property.

The issue in this case is one of timing. In simple terms, the question presented is whether a property owner must claim this exemption during the first year of eligibility or whether there is a longer period.

The Administrative Law Court (ALC) took the latter view and found these taxpayers properly claimed the exemption. This result follows the best reading of the statute's language, particularly when the statute is read with an eye on what actually happens when an assessable transfer of interest occurs. We affirm.

BACKGROUND

This appeal includes two cases that were consolidated at the ALC. The parties stipulated the facts of both cases. Fairfield Waverly, LLC, and GS Windsor Club, LLC, (collectively, "Taxpayers") purchased property in Dorchester County during the closing months of 2012.

Neither taxpayer claimed the ATI Exemption in 2013. When Taxpayers did claim the exemption in January of 2014, the Dorchester County Assessor ("the Assessor") denied the requests. Taxpayers appealed to the ALC, and the ALC ruled in their favor. The Assessor appealed the ALC's decision to this court.

ISSUE ON APPEAL

Did the ALC err in finding the Taxpayers were eligible to claim the ATI Exemption?

STANDARD OF REVIEW

The applicable standard of review comes from the Administrative Procedures Act. *See* S.C. Code Ann. § 1-23-610 (Supp. 2019). Our review is confined to the record, and we may affirm, reverse, or remand if the ALC's decision is defective in any of certain particulars. *See* § 1-23-610(B). We need not list those particulars

here because this case turns on an examination of statutory language. We review that issue de novo. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

ANALYSIS

Section 12-37-3135 creates the ATI Exemption. Subsection (A) defines five terms of art:

> (1) "ATI fair market value" means the fair market value of a parcel of real property and any improvements thereon as determined by appraisal at the time the parcel last underwent an assessable transfer of interest.
>
> (2) "Current fair market value" means the fair market value of a parcel of real property as reflected on the books of the property tax assessor for the current property tax year.
>
> (3) "Exemption value" means the ATI fair market value when reduced by the exemption allowed by this section.
>
> (4) "Fair market value" means the fair market value of a parcel of real property and any improvements thereon as determined by the property tax assessor by an initial appraisal, by an appraisal at the time the parcel undergoes an assessable transfer of interest, and as periodically reappraised pursuant to Section 12-43-217.
>
> (5) "Property tax value" means fair market value as it may be adjusted downward to reflect the limit imposed pursuant to Section 12-37-3140(B).

§ 12-37-3135(A). Subsection (B)(1) establishes the exemption itself:

> When a parcel of real property and any improvements thereon subject to the six percent assessment ratio provided pursuant to Section 12-43-220(e) and which is

> currently subject to property tax undergoes an assessable transfer of interest after 2010, there is allowed an exemption from property tax of an amount of the ATI fair market value of the parcel as determined in the manner provided in item (2) of this subsection. Calculation of property tax value for such parcels is based on exemption value. The exemption allowed by this section applies at the time the ATI fair market value first applies.

§ 12-37-3135(B)(1). Subsection (B)(2) sets the exemption's amount and gives two limitations:

> (a) The exemption allowed by this section is an amount equal to twenty-five percent of ATI fair market value of the parcel. However, no exemption value calculated pursuant to this section may be less than current fair market value of the parcel.
>
> (b) If the ATI fair market value of the parcel is less than the current fair market value, the exemption otherwise allowed pursuant to this section does not apply and the ATI fair market value applies as provided pursuant to Section 12-37-3140(A)(1)(b).

§ 12-37-3135(B)(2). These limitations operate to establish the "current fair market value"—in laymen's terms, the pre-sale fair market value—as the "floor" for property tax purposes.

Subsection (C) requires a notification procedure for the exemption:

> The exemption allowed in this section does not apply unless the owner of the property, or the owner's agent, notifies the county assessor that the property will be subject to the six percent assessment ratio provided pursuant to Section 12-43-220(e) before January thirty-first for the tax year for which the owner first claims eligibility for the exemption. No further

> notifications are necessary from the current owner while the property remains subject to the six percent assessment ratio.

§ 12-37-3135(C).

A different statute provides that "once every fifth year each county or the State shall appraise and equalize those properties under its jurisdiction." S.C. Code Ann. § 12-43-217(A) (2014). "[T]he county or State shall implement the program and assess all property on the newly appraised values." *Id.*

Here, and below, the parties' arguments center on section 12-37-3135's language. Though we look at the whole statute when considering how it operates, the parts directly at issue in this case are the definitions in subsection (A) of "ATI fair market value" and "current fair market value," as well as subsection (C) which says the exemption does not apply unless the county is given notice "before January thirty-first for the tax year for which the owner first claims eligibility for the exemption." § 12-37-3135(C).

Taxpayers claim section 12-37-3135's plain meaning allows them to choose when to claim the ATI Exemption. They argue the words "first claims" in subsection (C) shows the legislature contemplated some property owners might not claim the ATI Exemption immediately. To the same end, Taxpayers point out that the statute does not affirmatively direct or require property owners to claim the ATI Exemption the first year they are eligible to do so.

The Assessor contends any delay in claiming the exemption causes problems with the statutory definitions. The Assessor's basic argument relies on the fact that a property's "current" fair market value changes over time. Specifically, the Assessor argues that when a taxpayer delays in claiming the ATI Exemption, the delay causes the "ATI fair market value"—the appraised price after the property changed hands—to often become the same (or nearly the same) as the property's "Current fair market value." This happens because property is reappraised when an assessable transfer of interest occurs. In the Assessor's view, this necessarily triggers subsection (B)(2)'s statutory "floor" that the property's exemption value may not be less than its "current fair market value."

In other words, the Assessor argues a delay in claiming the exemption is not necessarily forbidden. A delay simply means the exemption will have no practical benefit because two of the statute's key terms—"ATI fair market value" and "current fair market value"—end up being the same number and because that number is the floor below which the exemption may not go.

There are two reasons we find the Taxpayers properly claimed the ATI Exemption. First, we find section 12-37-3135's language envisions a taxpayer might not claim the ATI Exemption immediately. As noted above, subsection (C) explains that the ATI Exemption does not apply unless the county has notice "before January thirty-first for the tax year for which the owner first claims eligibility for the exemption." § 12-37-3135(C). That language implicitly, if not directly, acknowledges an owner might not claim the exemption immediately. It plainly is not an affirmative requirement that a property owner claim the ATI Exemption during the first year of eligibility.

Section 12-37-3135(B)(1) supports this reading as well. That subsection explains the ATI Exemption "applies at the time the ATI fair market value first applies." This suggests the legislature intended the ATI Exemption's value to be set and established at the time the assessable transfer of interest **occurs**. *See Beaufort Cty. v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011) ("The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly.").

Second, we note that this statute is one of several property tax statutes. We do not look at statutes in isolation. Instead, we consider how the statutes operate with each other when striving to arrive at any one statute's proper meaning. *See S.C. State Ports Auth. v. Jasper Cty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) ("In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect."); *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) ("[T]he [c]ourt should not concentrate on isolated phrases within the statute, but rather, read the statute as a whole and in a manner consonant and in harmony with its purpose.").

All taxpayers are liable for property taxes based on the property they own as of December 31 of the preceding year. *See* S.C. Code Ann. § 12-37-610 (2014). The tax bills for a given year do not go out until September of that year. *See* S.C. Code

Ann. § 12-45-70(A) (2014). The bills for the "current" tax year are not due until the following January. *Id.*

There is also a statutory requirement that property be reappraised when it is sold. The legislature enacted that statute, often referred to in common parlance as "point of sale," in 2006. *See* S.C. Code Ann. § 12-37-3150 (2014). The county has to give the new property owner notice of a reappraisal by July 1 or as soon thereafter as practical. *See* S.C. Code Ann. § 12-60-2510 (2014). Related statutes explain the procedures for a property owner to contest the reappraised value. *See, e.g.,* S.C. Code Ann. § 12-60-2520 to -2540 (2014).

These features of the law—that tax liability for the current year looks backwards, that taxes are not billed until late in the "current" year or due until the next year, and that the reappraisal process following an assessable transfer of interest does not happen instantaneously—cannot help but inform our analysis on the ATI Exemption. To illustrate this, consider the position of someone who buys property after the month of January in a given year. We use January because January 31 is the key date for claiming the ATI Exemption in section 12-37-3135(C).

The person who buys property after January must have until January 31 of the following year to claim the ATI Exemption. To conclude otherwise would make the statute meaningless. By that time, however, the law envisions the property will have been reappraised.

This matters because it shows that even by the first January following the sale, the property's "current" fair market value will actually be the property's new and reappraised value. This illustrates the definitional parts of the ATI Exemption cannot change over time as the Assessor argues. Doing so would cause the ATI Exemption to "collapse" on itself the same way the Assessor argues it "collapses" for Taxpayers here.

Now consider the situation when, as here, an assessable transfer occurs later in the year. GS Windsor Club bought its property in November of 2012. Fairfield Waverly bought its property that December. Both taxpayers were going to be statutorily liable for the 2013 property taxes because they owned the property as of December 31, 2012. We do not know whether the reappraisal process would occur by the end of 2012, but we doubt it. Neither taxpayer would receive their first tax bill until September of 2013. That bill would be due in January of 2014.

The Assessor contends that even by the receipt of the first tax bill in September of 2013, Taxpayers already lost the ability to claim the ATI Exemption because they did not do so by the previous January, almost immediately after both sales occurred. We believe a construction that bars Taxpayers in this situation from claiming the exemption would create a disorderly process rather than an orderly one. We cannot conceive of a reason why one set of purchasers—those who purchase property early in the year—would be afforded two tax years to claim the ATI Exemption and a flexible reading of the word "current" while a second group—those who purchase later in the year—would have not even a year (here, less than two months) to make the same election and would have a literal reading of the word "current" pressed upon them.

Precedent explains the ultimate goal in statutory interpretation is to give effect to the statute's intent. *See Denman v. City of Columbia*, 387 S.C. 131, 138, 691 S.E.2d 465, 468 (2010). Section 12-37-3135's basic purpose is to provide property owners relief from the potentially burdensome increase in tax liability caused by an assessable transfer of interest and the reappraisal that follows. We believe the legislature intended all purchasers would have a meaningful opportunity to claim the ATI Exemption. Accordingly, we find the legislature articulated that intent in tying the exemption's application to notice by January 31 of "the tax year for which the owner first claims eligibility." § 12-37-3135(C).

In their brief and at oral argument, the Taxpayers contended this interpretation of the statute would allow property owners to claim the ATI Exemption several years, or even decades, after the assessable transfer of interest occurs. We disagree.

Section 12-43-217(A) mandates that the county or State reassess property every five years and explains "the county or State shall implement the program and assess all property on the newly appraised values." Allowing the ATI Exemption to override an appraised value set in the five-year reassessment scheme would defeat the legislature's intent of providing counties with a uniform mechanism of reappraising properties to determine their fair market values and assessing taxes accordingly. *See S.C. State Ports Auth.*, 368 S.C. at 398, 629 S.E.2d at 629 ("In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect."); *Duke Energy Corp.*, 415 S.C. at 355, 782 S.E.2d at 592 ("[T]he [c]ourt should not concentrate on isolated phrases within the statute, but

rather, read the statute as a whole and in a manner consonant and in harmony with its purpose.").

CONCLUSION

For the foregoing reasons, the ALC's judgment in Taxpayers' favor is

AFFIRMED.

LOCKEMY, C.J., and GEATHERS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cynthia Marie Sanders, Appellant,

v.

William S. Smith, Jr., Respondent.

Appellate Case No. 2017-001506

Appeal From Richland County
Dorothy Mobley Jones, Family Court Judge

Opinion No. 5770
Heard December 11, 2019 – Filed August 26, 2020

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Herbert E. Buhl, III, of Columbia, for Appellant.

Bonnie P. Horn, of Horn Law Firm, of Columbia, for Respondent.

LOCKEMY, C.J.: Cynthia Marie Sanders (Wife) appeals the family court's order denying her motion to set aside or vacate a 2010 divorce decree granting William Smith Jr. (Husband) a default divorce on the ground of one year's continuous separation. Wife argues the family court erred by (1) failing to find Husband's fraud upon the court warranted vacating the divorce decree, (2) finding she failed to file her motion within a reasonable time, and (3) denying the motion to vacate. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

Wife and Husband married on March 10, 1979, in Elizabethtown, Kentucky, and lived together as husband and wife until 1994. Husband filed a summons and complaint in South Carolina on February 6, 2009, seeking a divorce on the ground of one year's continuous separation, and he alleged the parties had previously divided all property and debts of the marriage.[1] Husband served in the United States Army until he retired in 1999. During Husband's military career, the parties moved several times and even lived in Germany for a period; however, the parties never resided together in South Carolina. Husband attempted to serve Wife by certified mail, with return receipt and restricted delivery to 810 North Dixie Avenue, Apartment 211, Elizabethtown, Kentucky, 42701, but the mail was returned to sender. The Hardin County Sheriff's Office then attempted to serve Wife at the same address but could not locate her. Husband therefore filed a petition for an order of service of the summons by publication, and the clerk of court issued an order of publication. The summons was published in a newspaper in Elizabethtown, Kentucky for three weeks, but Wife never filed a responsive pleading or appeared in court in South Carolina. Thereafter, the family court issued a divorce decree on February 5, 2010, granting Husband a default divorce based on one year's continuous separation. In addition, the court found all property and debts of the parties had been previously divided. Husband remarried in South Carolina in 2012.

On September 29, 2016, Wife filed a motion to "set aside and/or vacate" the divorce decree. She argued her address was 803—not 810—North Dixie Avenue, Apartment 211, Elizabethtown, Kentucky, 42701. She asserted Husband committed a "fraud upon the Court" in obtaining the default divorce because he knew or should have known the address he provided was incorrect and that she would likely not receive proper notice of the commencement of the divorce proceedings. Wife argued the family court lacked jurisdiction to grant the default divorce and she was entitled to an order granting her a divorce and equitable division of the parties' marital assets and debts, including an order for the division

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[1] Husband alleged he resided in this state for at least one year prior to commencing the divorce action, a claim Wife does not challenge. *See* S.C. Code Ann. § 20-3-30 (2014) (providing the plaintiff in a divorce action must have resided in South Carolina for at least one year prior to instituting the action).

of "Military Retired Pay and Survivor Benefit." Wife alleged Husband married another woman in 1999 while Wife and Husband were still legally married and Husband committed fraud upon the court to conceal his bigamous marriage, obtain a default divorce decree, and avoid equitable division of the parties' marital property.

The family court held a hearing on the motion, and Wife and Husband testified during the hearing. In addition, two former employees of the law firm that represented Husband in the divorce testified. The family court denied Wife's motion to vacate or set aside the divorce decree, finding Wife failed to challenge the validity of the divorce decree within a reasonable time when she filed the motion more than six years after the divorce. Additionally, the court rejected Wife's argument that service was defective and found Wife failed to establish Husband intentionally misrepresented Wife's address. This appeal followed.

ISSUES ON APPEAL

1. Did the family court err by finding Wife's delay in moving to vacate the divorce decree was unreasonable?

2. Did the family court err by denying Wife's motion to vacate the divorce decree based on fraud upon the court?

3. Did the family court err by denying Wife's motion to vacate the divorce decree based upon lack of personal jurisdiction?

STANDARD OF REVIEW

"Appellate courts review family court matters de novo, with the exceptions of evidentiary and procedural rulings." *Stone v. Thompson*, 428 S.C. 79, 91, 833 S.E.2d 266, 272 (2019). The family court has discretion in deciding whether to grant or deny a motion made pursuant to Rule 60(b) and we review such decisions using an abuse of discretion standard. *Ware v. Ware*, 404 S.C. 1, 10, 743 S.E.2d 817, 822 (2013); *Stoney v. Stoney*, 422 S.C. 593, 594 n.2, 813 S.E.2d 486, 486 n.2 (2018) (noting our appellate courts review procedural rulings using an abuse of discretion standard). "An abuse of discretion occurs when the order of the court is controlled by an error of law or whe[n] the order is based on factual findings that are without evidentiary support." *Ware*, 404 S.C. at 10, 743 S.E.2d at 822. "In

appeals from the family court, the appellate court has the authority to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence." *Id.*

LAW/ANALYSIS

I. Delay

Wife argues the family court erred by finding she failed to move to vacate the divorce decree within a reasonable time. She contends the defense of laches did not apply due to Husband's inequitable conduct and she acted promptly after she learned he had obtained a default divorce by fraud and deceit. Wife asserts she only became aware of the divorce in the latter part of 2014 and financial and health issues delayed her pursuit of the case at the time. She argues she filed the motion less than two years later and requested equitable division of the parties' marital property, including military retired pay and survivor benefits. Wife contends any delay in filing the motion did not injure, prejudice, or disadvantage Husband. We agree in part and disagree in part.

"On motion and upon such terms as are just, the [family] court may relieve a party . . . from a final judgment, order, or proceeding" for several reasons, including when the judgment is void or for fraud upon the court. Rule 60(b), SCRCP. When the movant alleges the judgment is void or that the nonmoving party engaged in fraud upon the court, the motion must "be made *within a reasonable time* . . . after the judgment, order or proceeding was entered or taken." Rule 60(b), SCRCP (emphasis added); *see also Chewning v. Ford Motor Co.*, 354 S.C. 72, 80, 579 S.E.2d 605, 609-10 (2003) (noting "[t]here is no statute of limitations when a party seeks to set aside a judgment due to fraud upon the court"); *Mr. T v. Ms. T*, 378 S.C. 127, 134, 662 S.E.2d 413, 417 (Ct. App. 2008) ("The language of Rule 60 specifically excludes motions under Rule 60(b)(4) . . . from the one[-]year limitation . . . and indicates these motions must be brought within a reasonable time."); *cf. Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 48, 590 S.E.2d 502, 505 (Ct. App. 2003) (holding the circuit court did not err by finding a Rule 60(b) motion was untimely when the movant "failed to proffer an argument as to why [the appellate court] should find that a four-year delay [wa]s reasonable").

With respect to Wife's claim that she is entitled to equitable division of the parties' property and military retirement benefits, we find the family court abused its discretion by finding she failed to file the Rule 60(b) motion within a reasonable time. Initially, we note that although Wife refers to the doctrine of laches, the family court's order does not address laches. Rather, the family court referred to Rule 60(b), SCRCP, which itself contains a timeliness requirement. *See* Rule 60(b), SCRCP (providing motions for fraud upon the court must be made within a "reasonable time"). Apart from the doctrine of laches, Rule 60(b) required Wife to move for relief within a reasonable time because she argued Husband committed fraud upon the court and that the order was void due to the court's lack of personal jurisdiction. The family court entered the divorce decree on February 5, 2010. Wife did not file her motion to vacate until more than six years later on September 29, 2016. Wife became aware of Husband's divorce sometime in 2014, although her testimony was conflicting as to exactly when. Despite this, Wife did not hire an attorney until 2016 or move to vacate the divorce decree until September 29, 2016. To explain this inaction, Wife stated she took time to gather financial resources and was "dealing with illnesses in the family and [her] own illness" at the time. The record is unclear as to when she obtained a copy of the divorce decree.[2] Further, the record contains no evidence Wife was aware, prior to acquiring the services of an attorney, that the divorce decree contained any finding as to their property or that Husband alleged the parties previously divided all of their property. Because Wife alleges Husband falsely asserted the parties had previously divided their property and requests to set aside the divorce decree so that she can seek equitable division of property and retirement benefits, we conclude the family court erred by finding Wife's delay was unreasonable under the circumstances. Accordingly, we now consider the merits of Wife's arguments that the family court erred by denying her motion to vacate the divorce decree.

II. Fraud Upon the Court

Wife asserts Husband committed fraud upon the court in obtaining the default divorce by falsely claiming he did not know Wife's correct address, suing her using her maiden name, and falsely asserting the parties had previously divided their property. Wife argues the default divorce decree must be vacated on equitable grounds. We agree in part and disagree in part.

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[2] During oral argument, the parties agreed Wife's attorney provided her a copy of the divorce decree in 2015.

The family court may set aside an order due to fraud upon the court. *See* Rule 60(b), SCRCP. "The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief." *Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991). A claim of fraud upon the court requires proof by clear and convincing evidence. *See Chewning*, 354 S.C. at 86, 579 S.E.2d at 612. "Fraud upon the court is a narrow and invidious species of fraud that 'subvert[s] the integrity of the [c]ourt itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.'" *Perry*, 357 S.C. at 47, 590 S.E.2d at 504 (first alteration in original) (quoting *Chewning*, 354 S.C. at 78, 579 S.E.2d at 608). "Like all other types of fraud, proving fraud upon the court requires showing that the perpetrator acted with the intent to defraud, for there is no such thing as accidental fraud." *Id.* at 47, 590 S.E.2d 504-05.

First, we find the record supports the family court's conclusion Wife failed to show Husband committed fraud upon the court by suing her in her maiden name and misrepresenting her address. Wife denied ever residing at 810 North Dixie Avenue and stated she resided at the 803 North Dixie Avenue address in 2007 and continued living there until about 2011. However, she admitted Husband had never visited her at that address and she did not know how close 803 North Dixie Avenue was to 810 North Dixie Avenue. Although Wife testified she completed a healthcare power of attorney for Husband in 2007 that contained her correct address, she did not recall providing him a copy. Wife stated she used her maiden name, Sanders, on her professional license but "Sanders-Smith" was her actual last name. She testified she began working as a nurse for the United States Army in 2008 and her employer knew her by Sanders-Smith as well as Sanders. Wife stated she was insured through TRICARE,[3] which required her to provide her contact information through DEERS.[4] Wife explained Husband was listed as her sponsor in DEERS and therefore could have accessed her information through the

[3] TRICARE is the health care program for uniformed service members, retirees, and their families around the world.

[4] The Defense Enrollment Eligibility Reporting System (DEERS) is a database of information on uniformed service members (sponsors), uniformed services civilians, and their family members, and eligible civilians must register in DEERS to get TRICARE.

DEERS account to ascertain her address. Husband testified he believed 810 North Dixie Avenue, Number 211 was the address Wife gave him and that at the time he had no doubt it was the correct address, and he therefore had no reason to search for the address in DEERS. Husband stated he had no reason to think the sheriff would be unable to find Wife at that address, and he denied purposefully misrepresenting facts to the court as to his knowledge of Wife's address. He testified he used Wife's maiden name, Sanders, because he believed she went by that name and that people in her community knew her by that name. Husband stated he did not know Wife's name appeared as "Sanders-Smith" in DEERS or on the healthcare power of attorney because he did not consult DEERS and was not aware he could have obtained a copy of the power of attorney document from the hospital. He testified he had not spoken to Wife for two years prior to filing the divorce action but explained he purchased a new phone in 2009 and Wife's number did not transfer to the new phone due to a glitch. Finally, Husband stated he could think of nothing else he could have done to help his attorney find Wife.

We find the foregoing supports the family court's conclusion Wife failed to demonstrate Husband committed fraud upon the court by providing an incorrect address for Wife or using her maiden name. We therefore affirm the family court's denial of Wife's motion to vacate the divorce decree on this basis.

Nevertheless, we conclude the family court erred by failing to find Husband committed fraud upon the court in representing the parties had previously divided all property. The record contains no evidence the parties had in fact divided all of their property. Accordingly, we find the evidence shows Husband intentionally misrepresented the truth when he alleged this in his complaint, and we vacate this provision of the divorce decree and conclude Wife is entitled to bring an action seeking equitable division and military benefits.

III. Personal Jurisdiction

Wife contends she was entitled to relief pursuant to Rule 60(b)(4), SCRCP, based on lack of personal jurisdiction because Husband never personally served her with the pleadings and she was unaware of the divorce proceedings. Wife asserts that pursuant to our decision in *Eckhardt v. Eckhardt*,[5] she is entitled to bring an action

[5] 309 S.C. 225, 420 S.E.2d 875 (Ct. App. 1992) (holding wife, who was served by mail in Kentucky where she then resided and did not appear in a North Carolina

for equitable division and military retired pay ten years after a default divorce. Wife contends the family court erred by relying on our supreme court's decision in *Sijon v. Green*[6] because its holding supports her position rather than Husband's. Wife argues this court should remand the case for a new trial on the merits. We agree in part and disagree in part.

Rule 60(b)(4), SCRCP, provides "the court may relieve a party . . . from a final judgment, order, or proceeding" if such judgment, order, or proceeding "is void." "The definition of void under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." *Belle Hall Plantation Homeowner's Ass'n, Inc. v. Murray*, 419 S.C. 605, 617, 799 S.E.2d 310, 316 (Ct. App. 2017) (quoting *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002)). "The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief." *Bowers*, 304 S.C. at 67, 403 S.E.2d at 129.

Section 15-9-710(8) of the South Carolina Code (2005) provides:

> When the person on whom the service of the summons is to be made cannot, after due diligence, be found within the [s]tate and (a) that fact appears by affidavit to the satisfaction of the court or . . . clerk of court . . . of the county in which the cause is pending and (b) it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made . . . the court[or clerk] . . . may grant an order that the service be made by the publication of the summons . . . .

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action, could maintain an action for division of marital property eight years following a divorce when her ex-husband did not request a division of property in his complaint).

[6] 289 S.C. 126, 128, 345 S.E.2d 246, 248 (1986) (holding when the record contains no evidence that a party-litigant received notice of a hearing and a judgment is rendered, the absent party, upon motion, is entitled to a judicial determination of whether he received proper notice).

> . . . .
>
> (8) when the defendant is a party to an annulment proceeding or whe[n] the subject of the matter involves . . . a legal separation.

"Generally, '[w]hen the issuing officer is satisfied by the affidavit, his decision to order service by publication is final absent fraud or collusion.'" *Belle Hall Plantation*, 419 S.C. at 615-16, 799 S.E.2d at 315 (alteration in original) (quoting *Wachovia Bank of S.C., N.A. v. Player*, 341 S.C. 424, 429, 535 S.E.2d 128, 130 (2000)).

First, because we vacate the portion of the divorce decree pertaining to the parties' property, we agree Wife may bring an action for equitable division. In *Eckhardt*, the court found the wife was entitled to maintain an action for division of all marital property, including military retirement benefits, following a divorce when the complaint in the divorce proceeding sought a no-fault divorce but did not request a division of property. 309 S.C. at 226-27, 420 S.E.2d at 876. There, the husband served the wife by mail in Kentucky but she filed no responsive pleadings and did not appear a North Carolina action. *Id.* at 226, 420 S.E.2d at 876. Similarly, here, we found Husband committed fraud upon the court by falsely stating the parties had previously divided their property and therefore vacated the portion of the divorce decree in which the family court found the parties had divided all property. Accordingly, we agree with Wife she is entitled to bring an action seeking military retirement benefits and equitable division of the parties' marital property.

However, we conclude the family court did not err by finding Wife failed to show the divorce decree was void for lack of personal jurisdiction. *See Bowers*, 304 S.C. at 67, 403 S.E.2d at 129 ("The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief."); *Belle Hall Plantation*, 419 S.C. at 617, 799 S.E.2d at 316 ("The definition of void under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." (quoting *Universal Benefits, Inc.*, 349 S.C. at 183, 561 S.E.2d at 661)). Here, two former employees of Husband's attorney's law firm testified concerning the affidavits of due diligence and petitions for service by publication. Rhonda Sullivan identified a certificate of service that indicated the

pleadings were sent by certified mail, return receipt and restricted delivery, to Wife at 810 North Dixie Avenue, Apartment 211, Elizabethtown, Kentucky, 42701. She stated the pleadings were returned to the law firm and the return receipt stated, "Return to sender. No such number. Unable to forward." Another employee, Geraldine Douglas, testified she performed an internet search for Wife by using "People Finder" and "White Pages" and found no listings for a "Cynthia M. Sanders, age 54, in Elizabethtown, Kentucky." The record contains the affidavit of nonservice submitted by the sheriff's deputy who attempted to serve Wife after Husband was unsuccessful serving her by mail. The document stated, "Not a good address need more info to serve." Husband obtained an order of publication and published the summons in *News Enterprise* in Elizabethtown on November 10, 17, and 24, 2009. The record contains the affidavits of due diligence and the petitions for orders of publication filed by Husband, the affidavit of service mailed to 810 North Dixie Avenue notifying Wife of the hearing, the order of publication authorizing service by publication pursuant to section 15-9-710, as well as the publication in *News Enterprise*. Wife does not contend section 15-9-710 precluded service by publication in this case; rather, she argues Husband defrauded the court in obtaining an order of publication. Having determined the family court did not err by finding Wife failed to show Husband committed fraud upon the court in obtaining service by publication or the divorce, we conclude the foregoing supports the family court's finding the law firm made a diligent effort to locate Wife based on the information Husband supplied. Therefore, the family court did not err by concluding Wife failed to show service was defective, and we affirm the family court's denial of Wife's motion to vacate the divorce decree pursuant to Rule 60(b)(4), SCRCP.[7]

CONCLUSION

Based on the foregoing, the order of the family court is

[7] Although we question whether the family court had in personam jurisdiction of Wife such that it was capable of equitably dividing the parties' property, the court made no disposition of the parties' property but merely found the parties had previously divided their assets. Moreover, Wife did not raise this argument to the family court or on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

KONDUROS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kaitlin Kimbrell Harper Whitesell, Respondent,

v.

Jeremy Page Whitesell, Appellant.

Appellate Case No. 2017-002601

Appeal From York County
Karen S. Roper, Family Court Judge

Opinion No. 5771
Submitted June 1, 2020 – Filed August 26, 2020

AFFIRMED

Thomas Franklin McDow, IV, and Erin K. Urquhart, both of McDow and Urquhart, LLC; and Barrett Wesley Martin, of Barrett W. Martin, P.A., all of Rock Hill, for Appellant.

Daniel Dominic D'Agostino and Jacqueline N. Davis, both of D'Agostino Law Firm, of York, for Respondent.

HEWITT, J.: This family court case involves requests to modify child support and custody. Father argues the family court erred by not specifically addressing which witnesses were credible and why. He also argues that the family court made several other errors depriving him of a fair trial and that Mother did not properly plead a claim for attorney's fees.

We respectfully disagree with these arguments. The family court's order reveals the reasons for its decision, and after reviewing the record, we agree with those reasons. This case began with Mother's request to modify child support per a provision in the parties' divorce decree. The lengthy and contentious trial proceeded because Father pursued a request to change the custody arrangement. We agree with the family court's decision to resolve that claim against Father. Given that outcome, we agree it is equitable for Father to pay a portion of Mother's attorney's fees as the family court ordered. We also agree Mother properly pled a claim for attorney's fees. Thus, we affirm.

BACKGROUND

Father and Mother married in February 2006. They separated in October 2009 and divorced in March 2011. They are the parents of two girls: Daughter 1, born in July 2006, and Daughter 2, born in March 2008.

Father and Mother met while they were students at York Technical College. They married shortly thereafter. Both Father and Mother went to school part-time after Daughter 1 was born.

This seems to have been a rocky relationship. Father claimed Mother was a habitual liar. Mother claimed Father spent too much time with other female students when he began a full school schedule.

Both parties claimed the other was physically abusive and some of the conduct described in the record is alarming. Father admitted throwing a block through the window of Mother's car and tying an extension cord from the bumper of his mother-in-law's car to the mother-in-law's garage door. The parties were, nevertheless, able to reach a final agreement at the end of their marriage. The divorce decree ratified that agreement.

Two parts of the divorce decree are relevant here. First, the parties agreed to joint physical custody with Mother being the primary custodial parent, subject to the agreed parenting plan. The parenting plan provided Father would have the children from the time school ended on Thursday until 6:00 p.m. on Sunday, every other week, and overnight on the Thursdays during the weeks of his "off" weekend. The decree provided "[b]oth parents will have reasonable and at all

times private telephone contact with the children, and the children will be allowed to have reasonable, private telephone contact with either parent."

Second, the parties agreed to deviate down from the DSS Child Support Guidelines and that Father would pay $400 per month in child support. The divorce decree noted both parties were enrolled in college and lacked a steady source of income. The decree explained "[b]ecause of the temporary nature of each party's financial situation, a change in either party's income or any of the other factors taken into consideration in the calculation of child support . . . will be a substantial change of circumstances upon which child support may be recalculated."

Mother filed this case in April 2016—roughly five years after the divorce. She sought an increase in Father's child support.

Father responded and sought more parenting time as well as an order terminating his child support and requiring child support from Mother.

Father claimed Mother would not work with him in co-parenting and was trying to alienate him from the children. His evidence included several disparaging text messages Mother sent him in the months before she filed this case. The messages were insulting and inflammatory.

Mother's chief allegation against Father is prolonged harassment. She claimed her disparaging messages were due to frustration at Father failing to timely pay child support, threatening to "take the girls" if Mother sued for an increase in child support, and failing to timely respond to her questions about the children's education, medical issues, and extracurricular activities.

Mother also claimed Father harassed her by keeping her under constant surveillance. Father, who is himself a private investigator, admitted to hiding under Mother's home in order to eavesdrop. He also, with his father's involvement, had investigators place cameras around Mother's family beach house during Mother's vacation and place GPS trackers on Mother's vehicle and her boyfriend's vehicle. Father also secretly recorded his phone calls with Mother, recorded Mother's calls with the children, and recorded conversations he had with the children. At one point, Father apparently had a physical altercation with Mother's then-boyfriend and was charged with assault and battery.

The family court tried this case for four days in June 2017. Thirteen witnesses testified. The court entered an order in August 2017, roughly two months later.

The family court increased Father's child support to $1,335 per month and ordered Father to pay his support through the clerk of court. The court also ordered Father to pay $20,000 of Mother's attorney's fees. This was slightly less than half of Mother's total attorney's fees. The court denied Father's requests to change custody and modify the parenting plan. The court ordered the parties to complete psychological evaluations that had been ordered four months before the trial and explained that the report from those evaluations would be submitted to the court-appointed co-parenting counselor. This appeal followed.

ISSUES ON APPEAL

1. Whether the family court erred in failing to directly and specifically address witness credibility.

2. Whether any of Father's numerous alleged errors warrant reversal or combine to deprive him of a fair trial.

3. Whether the family court erred in determining Mother properly pled a claim for attorney's fees and whether the trial court erred in awarding her $20,000 in attorney's fees.

STANDARD OF REVIEW

In family court appeals, this court reviews factual and legal issues de novo. *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011); *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). Although this court reviews the family court's findings de novo, we are not required to ignore the fact that the family court, which saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. *Lewis*, 392 S.C. at 385, 709 S.E.2d at 651–52. The appellant has the burden of showing this court the greater weight of evidence is against the family court's findings. *Id.* at 392, 709 S.E.2d at 655.

WITNESS CREDIBILITY

Father argues that before making findings of fact the family court should have determined witness credibility and made specific credibility findings. His brief relies on cases explaining the jury's role in judging credibility. Father also cites

cases in which appellate courts have admonished trial courts for issuing orders that lack a sufficient explanation and leave a reviewing court to "grope in the dark."

We agree that witness credibility can be important and that nobody—not the parties, a reviewing court, or anyone else—should be left to grope in the dark for the reasons a family court made a decision. Rule 26(a) of the South Carolina Rules of Family Court speaks to this by requiring the family court to support its decision with specific findings of fact and conclusions of law. We know of no authority requiring the family court to give a witness-by-witness account of its credibility assessments. *Epperly v. Epperly* explains an order is sufficient as long as a reviewing court can determine the basis for the family court's ruling. 312 S.C. 411, 414, 440 S.E.2d 884, 886 (1994).

The final order in this case is sixteen pages long. It explains the family court judge reviewed all of the exhibits, considered the testimony, and considered witness credibility. The order also summarizes and explains the rulings on each issue.

Father's core argument centers on Mother's credibility. He believes many examples in the record show Mother as being untruthful. It would be wasteful to list all of these examples here. The basic point is that Father believes Mother is generally dishonest and he asserts that numerous instances reveal this to be true.

Neither the guardian ad litem (the GAL) nor the family court agreed with this characterization. We agree with them. While the record suggests both parties were not always completely forthcoming and transparent with each other, the family court's decision was grounded in its finding that Mother and Father were fit and capable parents despite their substantial difficulties with each other.

A large part of Father's case hinged on the breakdown of a constructive co-parenting relationship. Father claims this breakdown was Mother's fault.

The family court disagreed and found "both parties" contributed to this relationship's deterioration and made co-parenting "extremely difficult." The court conspicuously mentioned that Father had continued conducting surveillance on Mother "[d]espite being divorced for over six years" and ordered Father to "cease to intrude" on Mother's life. The family court likewise ordered Mother to stop directing profane language at Father and suggested she use better self-control.

Father's argument relies largely on his view of the facts as he saw them at trial. When considered against the entire record, however, Father does not show by a

greater weight of the evidence that the family court erred. We therefore respectfully reject the argument that the lack of specific credibility findings leads to a different outcome than the one the family court reached.

CULMINATION OF ERRORS

Father argues that the family court made a variety of specific errors and that even if those alleged errors are insufficient to warrant relief when standing alone, they have combined to prejudice him and deprive him of a fair trial.

As already noted, the family court's decision was driven by a view of the record with which we agree. We will briefly examine Father's alleged errors.

Psychological Evaluations

Father sought an order requiring Mother to undergo a psychological evaluation. Mother initially opposed the request but consented after Father agreed to pay for it and to be evaluated himself. This agreement was memorialized in an order issued four months before the final hearing. The evaluations were not completed before trial. Father argues the family court should not have decided the case without the evaluations being completed.

The family court addressed this directly, stating the court would hold the record open if it determined the evaluations were necessary for its final decision. After the trial and after considering all the evidence, the family court found Mother and Father were both capable parents, there was no evidence of any mental health disorder, and it did not need the psychological evaluations to rule on custody. The court found the parties would benefit from working with a co-parenting counselor, ordered the psychological evaluations to proceed, and instructed the report from the evaluations be delivered to the co-parenting counselor.

Father argues one judge of the same court cannot overrule another. That did not happen here. The family court judge who tried this case did not overrule the prior order requiring the parties to submit to psychological evaluations. The family court, acting with the benefit of a full record, ordered the evaluations to proceed and specified the report would be delivered to the parties' co-parenting counselor.

Change of Conditions

Father points to the fact that he and Mother got along relatively well in the period immediately after their divorce and argues their deteriorating relationship constitutes a "change in conditions" warranting a custody modification.

As mentioned above, the family court found Father shared in the fault for this parenting relationship's deterioration. The family court specifically mentioned Mother's harmful conduct, but the family court also noted Mother's conduct was influenced by Father's invasion of her privacy and continued surveillance.

Equal Parenting Time

Father argues the family court misunderstood his claim to be that the children had been in his custody roughly fifty percent of the time.

In Father's supplemental and amended pleading, he alleged the parties deviated from the divorce decree's parenting plan and that those deviations "resulted in [Father] receiving an average of fourteen (14) overnights per month for the 2015 calendar year." Fourteen nights a month is equivalent to roughly half the year. The family court found both parties substantially followed the parenting plan with Father having the children from Thursday to Sunday and Thursday to Friday on alternating weeks. We agree with the family court that Father did not establish a deviation from the parenting plan that would constitute a substantial change of circumstances.

Father's Income

Father takes issue with the family court's statement in the final order that he "has a far greater income and significantly greater assets at his disposal [than Mother], including over $100,000 in his business bank accounts on December 31, 2016 with no debt associated with the monies." Father asserts that he is only part owner of the private investigation business he shares with his brother and his father and that he has no authority to disperse business funds.

The fact that Father is only a fifty percent owner of the business was not contested at trial. The record also supports the fact that Father is in a superior financial position as compared to Mother. At the time of trial, Mother's gross monthly income was $4,900. She also paid for the children's health insurance and for the

cost of daycare. Father's financial declaration at the time of trial showed gross monthly income of $8,500. The evidence showed his business was thriving.

Father also disagrees with the family court's finding that he did not accurately set forth his income until shortly before trial. This conflicts with the testimony of Bernard Ackerman, a CPA who explained in his examination that Father's February 2017 financial declaration did not accurately reflect the overtime, business income, and other profits Father received from his company.

Disparaging Text Messages

Father argues Mother's abusive communications are a sign of a mental health disorder. There is no evidence in the record Mother has a mental health disorder. The GAL issued an extensive report and testified at the final hearing. The GAL believed both parties were capable parents and expressed a desire for the parents "to be able to get along." When the family court specifically asked the GAL about mental evaluations, the GAL explained she had not seen any evidence of a mental health disorder during her investigation.

We also note, as did the family court, that the record suggests Mother's abusive messages were the result of frustration with Father's behavior.

Father also disputes the family court's statement that "[t]he parties do not communicate well, have engaged in disparaging remarks and surveillance, and the protracted litigation has further deteriorated their relationship." Father claims he has never made any disparaging remarks toward Mother.

We do not understand the family court to have found Father disparaged Mother. We believe the family court's decision was informed by its recognition that both parties were at fault for the acrimony in the relationship.

Preference of Children & Alleged Unilateral Decisions

Father argues the family court did not give the proper weight to Daughter 1's wishes or to the fact Mother allegedly made unilateral parenting decisions involving the children.

The family court found Mother consulted with Father on a host of issues and Father did not demonstrate Mother prevented him from participating in decisions affecting the children. The court acknowledged evidence Mother did not inform

Father of some of the children's appointments, but the court also noted evidence Mother regularly informed Father of other things and Father would sometimes fail to respond.

Section 63-15-30 of the South Carolina Code (2010) requires the family court to consider a child's reasonable preference for custody when evaluating a child's best interest and to weigh the preference based on several factors. Though the family court's final order did not mention either daughter's preference, the family court discussed them in the extensive oral ruling it delivered at the trial's conclusion. The family court noted Daughter 1 would prefer to live with her Father and Daughter 2 seemed to favor her mother. Despite these preferences, the family court did not believe changing custody would be in the girls' best interest. We agree.

Alleged Poor Supervision

Father disagrees with the family court's finding that he did not present any credible evidence Mother failed to properly supervise the minor children. Father's key evidence involves an incident in which the girls allegedly drove a golf cart around the neighborhood without adult supervision.

Mother admitted this occurred and the GAL stated she believed it was an isolated incident. The GAL additionally noted that even though Father had private investigators following Mother, nothing further was brought to her attention warranting concern as to Mother's supervision.

Cross-examination

Father argues the family court erred in denying his request to re-cross the CPA. Father claims Mother's counsel brought out new matters during the witness's redirect examination.

Rule 611, SCRE, provides "[a] witness may be re-examined as to the same matters to which he testified only in the discretion of the court, but not without exception he may be re-examined as to any new matter brought out on redirect." This argument is reviewed under an abuse of discretion standard. *Liberty Mut. Ins. Co. v. Gould*, 266 S.C. 521, 533, 224 S.E.2d 715, 720 (1976) ("The right to, and scope of, recross-examination is within the sound discretion of the trial court.").

We examined the witness's testimony as well as the exchange between the family court and Father's counsel and see no evidence the family court abused its discretion.

Alienation

Father disagrees with the family court's finding that he failed to demonstrate any pattern of Mother refusing to allow the children to participate in events with him and his extended family.

The family court found the evidence demonstrated the children usually attended Father's family events and missed events, while disappointing, were a normal consequence of conflicting parenting schedules. We agree. There is evidence and testimony showing Mother would arrive early and save seats for both Father and his family members at events such as graduations or gymnastics performances. Mother also testified regarding "extra time" Father would get, explaining "[o]ccasionally if there was a birthday party or, like, when one of the cousins had a birthday party or his family members or if there is a church activity," she accommodated those events and let the children stay the extra night at Father's home until Monday morning.

To be fair, there is evidence Mother may have told Daughter 1 she was not invited to a cousin's birthday party when Daughter 1 was, in fact, invited. Still, the record illustrates Father has a large extended family with many cousins living nearby. We agree with the family court that scheduling conflicts are inevitable when children are splitting time between multiple homes.

Camp Cherokee

In the summer of 2016, both Mother and Father attempted to pick the children up from a summer camp. The GAL believed, and we agree, that both parties knew they disagreed over who would be picking up the children and that both parties nevertheless drove to the camp and knew there would be an argument. Father argues the pickup day was one of his days per the parties' written agreement and he never agreed to deviate from that agreement. Mother asserts that both Father and his attorney refused to respond to Mother's questions about the pick-up.

We agree the evidence suggests both parties bear fault for this incident and that the incident does not materially affect the outcome of the issues in question.

Day Care Expenses

The family court found Mother incurred an average of $60 per month in child care expenses. Father asserts the child support guidelines, when properly applied, call for his child support to be roughly $40 lower per month when day care expenses are adjusted to account for any qualified child care tax credits.

This argument was not presented to the family court and we may not consider it here. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421–22, 526 S.E.2d 716, 724 (2000). In Father's motion for the family court to reconsider its decision, Father argued the evidence did not establish Mother had $60 per month of work-related day care expenses. He did not argue the family court failed to properly account for those expenses under the child support guidelines.

Payment Through Clerk of Court

Father does not agree with the family court's ruling that "[d]ue to the history of conflict between the parties regarding whether [Father] has paid timely, payments shall be made through the Office of the Clerk of Court for York County. The record shows there is a history of conflict and arguments over child support. The family court's decision avoids further disputes about these payments.

Surveillance

Father argues Mother did not seek specific relief regarding surveillance and notes he objected to any testimony regarding his surveillance of Mother.

The family court allowed testimony about surveillance because it believed the testimony might shed light on the parties and how they interacted with each other. The record re-enforces the wisdom of that decision. The GAL expressed concern about the negative relationship between the parents, including Father's regular practice of recording his conversations with Mother. The surveillance and recording practices were an issue with children as well as with Mother. The family court noted Father's continued investigation into Mother was inconsistent with his stated goal of having a positive parenting relationship with her. This is overwhelmingly supported by the record.

To sum, Father has not demonstrated any errors that justify modifying or remanding this case.

ATTORNEY'S FEES

Father argues that Mother failed to properly plead a claim for attorney's fees and that the family court did not correctly apply the factors relevant to an award of fees.

Mother specifically requested attorney's fees in her complaint. The sixth numbered paragraph in Mother's complaint was titled "Attorney Fees and Suit Money" and reads, in its entirety, "Plaintiff has a meritorious cause of action. The Plaintiff requests attorney's fees for having to prosecute this action."

We are not aware of any authority suggesting this pleading was deficient. Father cites *Anderson v. Tolbert*[1] and *E.D.M. v. T.A.M.*[2] Neither case supports the proposition that a party in a family court case must plead more than this to state a claim for an award of fees. It also bears mentioning that attorney's fees were plainly identified during the pre-trial hearing as an issue for trial and there was no objection to any claim for fees until the trial began.

When determining whether an attorney's fee is proper, the court considers "(1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; (4) effect of the attorney's fee on each party's standard of living." *E.D.M. v. T.A.M.*, 307 S.C. 471, 476–77, 415 S.E.2d 812, 816 (1992). The amount of fees is determined by: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; (6) customary legal fees for similar services." *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

Father disagrees with the family court's findings that Mother had less ability to pay her own attorney's fees, that Mother was the prevailing party, and that many of Father's complaints were exacerbated by his own negative conduct.

We respectfully disagree with these arguments. Father's financial situation is superior to Mother's. We agree he can afford to pay Mother the amount awarded. We also agree Mother was the prevailing party. Mother brought this case for the purpose of modifying child support and succeeded in that endeavor. Mother also

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[1] 322 S.C. 543, 473 S.E.2d 456 (Ct. App. 1996).
[2] 307 S.C. 471, 415 S.E.2d 812 (1992).

prevailed on Father's claim to adjust the parenting plan and child support in his favor. The record amply supports the family court's decision requiring Father to pay Mother $20,000 of the roughly $44,000 in fees she incurred.

CONCLUSION

Based on the foregoing, the family court's judgment is

AFFIRMED.[3]

LOCKEMY, C.J., and GEATHERS, J., concur.

[3] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Nexstar Media Group, Inc., successor in interest to Media General, Inc., d/b/a WSPA and WYCW, Respondent,

v.

Davis Roofing Group, LLC and Mark Mahoney, Defendants,

Of which Davis Roofing Group, LLC is the Appellant,

And Mark Mahoney is a Respondent.

Appellate Case No. 2017-001546

Appeal From Spartanburg County
Gordon G. Cooper, Master-in-Equity

Opinion No. 5772
Submitted May 1, 2020 – Filed August 26, 2020

AFFIRMED

John Clifford Strickland, of Strickland Law Firm, of Spartanburg, for Appellant.

Craig Horger Allen, of Craig H. Allen, P.A., of Greenville, for Respondent Nexstar Media Group, Inc., successor in interest to Media General, Inc., d/b/a WSPA and WYCW.

James Stone Craven, of the Law Office of James Stone Craven, of Greenville, for Respondent Mark Mahoney.

KONDUROS, J.: Nexstar Media Group, d/b/a WSPA and WYCW, formerly Media General, Inc., (Nexstar) brought an action against Davis Roofing Group, LLC (Davis Roofing) and Mark Mahoney to recover the balance due for advertising services Nexstar provided to Davis Roofing pursuant to a contract Mahoney signed. Davis Roofing argued requests to admit it sent to Mahoney should be deemed admitted under Rule 36, SCRCP, because Mahoney did not respond. The Master-in-Equity declined to deem the unanswered requests admitted and ruled in favor of Nexstar against Davis Roofing in the amount of $39,705. Davis Roofing appeals, arguing the master erred in failing to deem the requests admitted. We affirm.

FACTS/PROCEDURAL HISTORY

Nexstar, a media company, provided advertising services for Davis Roofing based upon a marketing campaign agreement Mahoney signed on behalf of Davis Roofing on May 9, 2012. Mahoney indicated he was the director of marketing for Davis Roofing on the agreement with Nexstar. The balance for the advertising services became past due, and Nexstar brought an action against Davis Roofing on July 24, 2014, seeking a judgment against Davis Roofing for $39,225 and the costs of the action.

Davis Roofing answered Nexstar's complaint, stating Mahoney was neither an employee nor an agent of the company and had no authority to bind it to an advertising agreement. Nexstar thereafter filed an amended complaint against both Davis Roofing and Mahoney.

Mahoney, pro se at the time, filed a two-page letter with the court in response to Nexstar's amended complaint, asserting he served as director of marketing for Davis Roofing and signed the advertising agreement with the knowledge and consent of the company. Davis Roofing answered, asserting Mahoney did not have authority to bind the company, and sought dismissal from the action, damages, and attorney's fees.

Approximately fourteen months after Mahoney responded to Nexstar's amended complaint as a pro se party, he obtained counsel, who filed a notice of appearance

and a formal response, asserting Mahoney was acting in his capacity as marketing director of Davis Roofing when he signed the advertising contract.

The matter proceeded to trial and on March 13, 2017, in a pretrial proceeding, Davis Roofing moved for a default judgment against Mahoney, arguing Mahoney did not respond to its amended complaint in a timely manner, which caused prejudice. The master denied Davis Roofing's motion, finding Davis Roofing had not made a cross-claim against Mahoney and Mahoney's pro se letter served as his answer.

Davis Roofing also moved for summary judgment against Mahoney based upon a motion it had filed on the eve of trial, asserting it served Mahoney with requests to admit early in the action, to which he never responded. Davis Roofing argued because thirty days passed with no response, Rule 36, SCRCP, dictated the requests should be deemed admitted, leaving no material fact in dispute. The master denied the summary judgment motion and the discovery request as untimely.

During the trial, after Mahoney testified, Davis Roofing again asked the court to rule whether the requests to admit it mailed to Mahoney in 2015 should be deemed admitted pursuant to Rule 36, and to strike Mahoney's testimony from the record because "the admissions of . . . Mahoney are contrary to his testimony"; he "was served these admissions"; and "[h]e never responded to these." Mahoney, however, argued he did not receive the requests to admit and was likely hospitalized during the time they were served. Counsel for Mahoney notified the master he communicated with Davis Roofing when he filed a notice of appearance in May of 2016, but Davis Roofing did not thereafter send the requests to admit to counsel. The master decided to withhold a ruling on this question until the end of the trial.

At the close of all testimony, Davis Roofing reiterated it mailed requests to admit to Mahoney's address of record, it did not receive a response, and under Rule 36, it would be prejudicial to Davis Roofing if not allowed to rely upon Mahoney's admissions. Davis Roofing also asserted Mahoney did not obtain counsel until approximately six months after it sent the requests and the thirty-day deadline in the rule had long passed by then. Davis Roofing also argued Rule 36 did not require it to resend the requests to Mahoney's counsel.

The master denied Davis Roofing's motion to deem the requests admitted, noting Mahoney was not represented by counsel when the requests were sent to him, he should not be held to the strictness of the rule, and Davis Roofing did not alert Mahoney's counsel about the requests once Mahoney's counsel filed a notice of appearance with the court.

On April 4, 2017, the master issued an order granting Nexstar a judgment against Davis Roofing for the balance due for advertising, plus costs, and stating:

> Davis Roofing sought a determination that Requests for Admission sent to Mahoney in December 2015[] should be deemed admitted due to [Mahoney's] failure to respond. Mahoney denied having ever received any Requests for Admission from Davis Roofing. At the time of the Requests for Admission, Mahoney was *pro se* in this action. In May 2016, Mahoney retained counsel[] who provided notice to counsel for Davis Roofing of his appearance and inquired whether any further responses were needed. Nothing further was requested. Based on the facts and circumstances existing, I find that Mahoney should not be held to the strict standard of Rule 36, SCRCP, and find that the Requests for Admission should not be deemed admitted.

On April 13, 2017, Davis Roofing filed a notice and motion to reconsider pursuant to Rules 59 and 60(b), SCRCP, to set aside the final order, indicating:

> This motion is based upon the applicable Rules of Court, South Carolina case law, and any affidavits and/or memorandum which may be filed prior to the hearing. [Davis Roofing] further allege[s] that [Davis Roofing] [is] prompt in filing for relief, the existence of meritorious defenses, and [Nexstar] and [Mahoney] will not be adversely prejudiced.

At the motion to reconsider hearing on June 29, 2017, Davis Roofing argued because Mahoney did not move to withdraw or amend the matters admitted under Rule 36, the master erred in allowing Mahoney to, in effect, amend the admitted

requests, and this prejudiced Davis Roofing. Nexstar expressed surprise that Davis Roofing based its motion on the master's decision regarding Rule 36 and the requests to admit. Mahoney argued Davis Roofing's motion to reconsider was not pled with sufficient specificity, and his motion "made no statement whatsoever of what he was asking to be reconsidered. He especially never mentioned Rule 36." The master noted Davis Roofing had a right to file the motion for reconsideration, but denied it for two reasons: "I feel that my ruling was correct" and "the second is that you have not put the attorney for [] Mahoney and [Nexstar] on notice that this is your argument."

The master issued an order denying Davis Roofing's motion for reconsideration, finding:

> Mahoney denied having ever received the Requests for Admission. Mahoney was acting *pro se* at the time the Requests for Admission were sent. Mahoney retained counsel shortly thereafter, but no follow up correspondence was ever sent to Mahoney or his counsel seeking responses to the Requests for Admission or otherwise prompting for a response. Further, no Motion to compel was ever made or filed. Davis Roofing filed a Motion for Summary Judgment immediately before trial and based its Motion on Mahoney's failure to respond to the Requests for Admission. It is important to note that copies of the Requests for Admission were not provided to Plaintiff's counsel, nor to Mahoney's counsel, until immediately before trial.

This appeal followed.

STANDARD OF REVIEW

"An action for breach of contract seeking money damages is an action at law." *Johnson v. Little*, 426 S.C. 423, 428, 827 S.E.2d 207, 210 (Ct. App. 2019) (quoting *Branche Builders*, *Inc. v. Coggins*, 386 S.C. 43, 47, 686 S.E.2d 200, 202 (Ct. App. 2009)). "In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law." *Miller Constr. Co. v. PC Constr. of Greenwood*, *Inc*., 418 S.C. 186, 195, 791 S.E.2d 321, 326 (Ct. App.

2016) (quoting *Temple v. Tec-Fab*, *Inc.*, 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009) (per curiam)). "The [c]ourt will not disturb the trial court's findings unless they are found to be without evidence that reasonably supports those findings." *Id*. (quoting *Temple*, 381 S.C. at 600, 675 S.E.2d at 415).

LAW/ANALYSIS

I. Timeliness of Appeal

As an initial matter, Nexstar and Mahoney contend on appeal Davis Roofing's motion for reconsideration lacked sufficient specificity pursuant to Rule 7, SCRCP, and therefore did not toll Davis's time to file its appeal rendering the appeal untimely.[1] We disagree.

Davis Roofing filed its motion for reconsideration "for an Order setting aside the Final Order" pursuant to both Rules 59 and 60(b), SCRCP. Rule 59(a) provides:

> A new trial may be granted to all or any of the parties and on all or part of the issues . . . in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in the courts of the State. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Rule 59 also establishes that a motion made pursuant to this rule will stay the time to file an appeal: "The time for appeal for all parties shall be stayed by a timely motion under this Rule and shall run from the receipt of written notice of entry of the order granting or denying such motions." Rule 59(f).

[1] Nexstar and Mahoney did not specifically reference Rule 7 during the reconsideration hearing, but they did argue their surprise and lack of notice that Davis Roofing's motion was based on Rule 36, SCRCP.

Rule 60(b) allows a trial court to relieve a party from a final order for "mistake, inadvertence, surprise, or excusable neglect" upon a motion when terms are just. Unlike Rule 59, however, Rule 60 states: "A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation."

Rule 7, SCRCP, establishes the form required of motions to a court.

> An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

Rule 7(b)(1).

Our supreme court addressed the requirements of Rule 7 in *Camp v. Camp*:

> Rule 7(b)(1) [] requires that motions "shall state with particularity the grounds therefor, and shall set forth the relief or order sought." The particularity requirement "is to be read flexibly in 'recognition of the peculiar circumstances of the case.'" "By requiring notice to the court and the opposing party of the basis for the motion, [R]ule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that 'the court can comprehend the basis of the motion and deal with it fairly.'" Therefore, when a motion is challenged for a lack of particularity, the court should ask "whether any party is prejudiced by a lack of particularity or 'whether the court can comprehend the basis for the motion and deal with it fairly.'" "The particularity requirement should not be applied in an overly technical fashion when the purpose behind the rule is not jeopardized."

386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010) (footnotes and citations omitted) (first quoting *Cambridge Plating Co. v. Napco*, *Inc.*, 85 F.3d 752, 760 (1st Cir.

1996); then quoting *Calderon v. Kan. Dep't. of Soc. & Rehab. Servs.*, 181 F.3d 1180, 1186 (10th Cir. 1999); then quoting *Registration Control Sys., Inc. v. Compusystems, Inc.*, 922 F.2d 805, 807-08 (Fed. Cir. 1990); and then quoting *Andreas v. Volkswagen of America*, *Inc.*, 336 F.3d 789, 793 (8th Cir. 2003)).

Pursuant to the *Camp* decision, we find Nexstar and Mahoney were well equipped to understand and respond to Davis Roofing's motion to reconsider because the issue asserted was addressed repeatedly at trial and the parties were not prejudiced by the general nature of the motion. We also find the master was in a position to understand Davis Roofing's motion and to analyze its request fairly, and pursuant to precedent, "[t]he particularity requirement should not be applied in an overly technical fashion [and] the purpose behind the rule was not jeopardized." *Id.* (quoting *Andreas*, 336 F.3d at 793). Accordingly, we hold Davis Roofing's motion for reconsideration met the requirements of Rule 7, effectively tolling the time for filing a notice of appeal, and thus, its appeal was timely.

II. Requests to Admit

Davis Roofing argues the master erred in not deeming the requests it sent to Mahoney admitted under Rule 36, SCRCP. We disagree.

Davis Roofing sought recourse for not receiving a response to the requests to admit it sent to Mahoney in 2015. Davis Roofing filed a motion for summary judgment on the eve of the 2017 trial and sought a ruling during the trial, notifying the master it mailed the requests to Mahoney's address of record, and it had a certificate of service and an affidavit from the paralegal who mailed the requests.[2]

Mahoney asserted he did not receive the requests to admit and was hospitalized and in a comatose state around the time Davis Roofing indicated it sent the requests. Nexstar also notified the master it did not receive a copy of the requests to admit. The Record indicates the parties discussed at trial that the cover letter to the requests did not direct Mahoney, pro se at the time, to respond in thirty days. When Mahoney obtained representation, his counsel notified Davis Roofing of his involvement, yet the supposed outstanding requests were not sent to his counsel. Davis Roofing asserts, however, that under Rule 36, the requests should have been

[2] The requests to admit, cover letter, certificate of service, and affidavit of the paralegal are not part of the Record.

admitted and it was error for the master to fail to do so, noting the rule does not distinguish between a party who is pro se or one represented by counsel in terms of the requirement to respond.

Rule 36(a), SCRCP, states:

> A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) [, SCRCP,] set forth in the request that relate to statements or opinions of fact or of the application of law to fact . . . .
>
> . . . The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as stipulated in writing by the parties pursuant to Rules 29 and 6(b), [SCRCP,] the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him.

This court has affirmed the seriousness of the ramifications for a failure to respond to requests in a timely matter. In *Scott v. Greenville Housing Authority*, this court stated: "South Carolina has long had the discovery rule that failure to respond to requests for admissions renders any matter listed in the request conclusively admitted for trial." 353 S.C. 639, 645, 579 S.E.2d 151, 154 (Ct. App. 2003). The *Scott* court further noted: "[O]ur courts have repeatedly found that failure to respond to requests for admissions deems matters contained therein admitted for trial, regardless of whether the admission concerns a matter responded to in a party's pleadings." *Id.* at 646, 579 S.E.2d at 154-55.

However, South Carolina jurisprudence also establishes a trial court may use its discretion in finding requests to admit are not deemed admitted when the circumstances indicate otherwise. For example, the supreme court affirmed the

decision of a trial court to not deem requests admitted when counsel for one party represented to the trial court "he had never received the requests," another attorney indicated "he had no memory of the delivery and service of the requests," and another denied having received a letter following up on the status of the requests. *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 219, 493 S.E.2d 826, 836 (1997). "The master in equity did not abuse his discretion by refusing to deem admitted the requests for admission, particularly in light of the lack of hard proof that [the party] actually received the requests." *Id.*

Similarly, in *Collins Entertainment, Inc. v. White*, this court reviewed whether the trial court erred in failing to deem requests admitted when the party to whom they were addressed did not respond. 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005). The court found no prejudice when one set of requests was sent to the wrong address and the complaining party waited until the start of trial to notify the court and the other party of the outstanding second request. *Id.* at 553, 556, 611 S.E.2d at 265, 267.

> Instead of informing the court and Collins of the outstanding request, Appellants waited until the beginning of trial to mention the outstanding requests to Collins and the new judge. We find Appellants cannot now complain of being prejudiced by the refusal to deem the requests admitted because they could have raised the issue before [the new judge].

Id. at 557, 611 S.E.2d at 267. The court also noted the complaining party was not prejudiced by the trial court's decision because the subject matter of the requests could be revealed at trial.

> The [trial] court did not prevent Appellants from offering proof of their damages. It simply required Appellants to offer the actual proof and not rely upon [a] Second Request to Admit. Therefore, Appellants were not prejudiced by the refusal to deem the requests admitted. Under the circumstances, we find the trial court properly ruled on the issue.

Id. at 557, 611 S.E.2d at 267-68.

We find no error by the master in light of the facts of this case. Mahoney denied ever receiving the requests and was hospitalized for a serious medical condition at the time Davis Roofing mailed the requests. After his hospitalization, Mahoney obtained counsel, who contacted Davis Roofing. Davis Roofing did not tell the attorney, nor send the Requests to Admit to Mahoney's attorney. Additionally, Davis Roofing waited until the eve of trial to move for summary judgment based upon Mahoney's failure to respond. Likewise, a copy of the requests was not provided to Nexstar until the eve of trial. Davis Roofing had ample opportunity to compel a response. We also note Davis Roofing examined Mahoney at trial, defeating a claim of prejudice. We find no error in the master's consideration of all the special circumstances. We find these circumstances are similar to the facts set forth in *Collins Entertainment* and *Crestwood Golf Club* in which the trial court's denial to deem the requests admitted was upheld on appeal.[3]

We also find Davis Roofing's corollary arguments regarding whether the master erred by allowing Mahoney to withdraw the admissions under Rule 35(b), SCRCP, and by failing to rule consistently with the form and substance of Rule 36 are encompassed within the issue addressed above. Further, nothing in the Record indicates the master made a finding Mahoney could withdraw his admissions; rather, the master found the requests were not admitted at all.

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[3] We note this court recently reversed a decision of a master as error for allowing a trial to proceed without examining the potential for prejudice to a party who did not receive a response to a discovery request in *Richardson ex rel. 15th Circuit Drug Enforcement Unit v. Twenty-One Thousand & No/100 Dollars*, Op. No. 5732 (S.C. Ct. App. filed June 17, 2020) (Shearouse Adv. Sh. No. 24 at 40). That case is distinguishable particularly because this court found

> [t]he trial court abused its discretion by not delaying the trial to scrutinize the nature of the undisclosed discovery, the prejudice to White, and the need to stay the trial until discovery could finish. A court that does not use discretion—or recognize it has discretion—when discretion exists commits an error of law.

Id. at 45. Unlike *Richardson*, we find here the master recognized and exercised that discretion.

Accordingly, the decision of the master is

AFFIRMED.[4]

WILLIAMS and HILL, JJ., concur.

[4] We decide this case without oral argument pursuant to Rule 215, SCACR.