

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

AMY ELIZABETH YOUNG, ) No. 1 CA-CV 08-0386  
)  
Petitioner/Appellant, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
)  
MARK CONCEIO, ) (Not for Publication -  
) Rule 28, Arizona Rules of  
Respondent/Appellee. ) Civil Appellate Procedure)  
)

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Appeal from the Superior Court in Maricopa County

Cause No. FN 2007-001774

The Honorable Robert Budoff, Judge

**REVERSED AND REMANDED**

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Michael E. Hurley  
Attorney for Appellant

Phoenix

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J O H N S E N, Judge

¶1 This is an appeal from the superior court's denial of a Motion for Reconsideration and for Partial Relief from Judgment pursuant to Rule 85(C) of the Arizona Rules of Family Law Procedure. For the following reasons, we reverse the

superior court's order denying the motion and remand for further proceedings.

#### **FACTUAL AND PROCEDURAL HISTORY**

¶2 Trial in the dissolution of the marriage of Amy Elizabeth Young ("Wife") and Mark Conceio ("Husband") was held on April 1, 2008. The court entered a dissolution decree on April 14, 2008. The decree disposed of the parties' property, including the marital home, which was encumbered by a first mortgage and a separate home equity line of credit. During the marriage, Husband alone drew on the line of credit. At trial, he testified that the balance owed on the line of credit was \$56,000. In the decree, the court concluded that each party was entitled to half of the equity remaining in the marital home. The court calculated that, taking into account the first mortgage balance of \$139,000 and the \$56,000 owing on the line of credit, Husband and Wife each would have home equity of \$43,750. Accordingly, the court awarded the residence to Wife "provided she is able to refinance the residence and pay Husband his equity interest which is determined to be \$43,750.00 by July 31, 2008."

¶3 At trial, the parties disputed the use of the funds that Husband had obtained from the line of credit. Wife argued Husband had put those funds toward his separate expenses; Husband testified he used the funds exclusively for community

purposes. Among the exhibits admitted in evidence was Husband's verified financial affidavit, which listed his monthly expenses.

¶4 In the decree, the court stated:

Wife also alleges that the \$56,000.00 apparently utilized from the line of credit was also used by Husband for sole and separate purposes and that she should be reimbursed for at least half of those funds. Husband alleges that he also used the line of credit money to pay community expenses in the last two years due to the parties' lack of income. No evidence has been presented to controvert Husband's testimony in this regard. Again, these funds were needed to support the parties during the last year.

The Court therefore finds, in the absence of evidence to the contrary, that the utilization of the . . . line of credit funds was for community purposes.

¶5 Roughly six weeks after entry of the decree, on May 28, 2008, Wife filed a Motion for Reconsideration and for Partial Relief from Judgment. Wife asserted in her motion that when she contacted the lender to secure a new home loan so that she could buy out Husband's interest in the residence, she discovered that although Husband had testified he had drawn \$56,000 on the line of credit, in reality the balance on the line of credit was not \$56,900 but was \$95,000. She asserted that despite Husband's testimony that he had taken only \$56,000 from the line of credit, in reality, in addition to that amount, he had drawn down another \$35,000 on March 10, 2008 (three weeks before trial) and on March 31, 2008, the day before trial, he

had exhausted the line of credit by drawing another \$4,800. She argued Husband had perjured himself and committed a fraud on the court by failing to disclose his additional receipt of funds from the line of credit, and that the fact that he had drawn down more funds than he testified to was newly discovered evidence. Attached to her motion, Wife submitted bank statements showing the March 2008 withdrawals.

¶6 Although the court ordered a response, Husband filed no substantive response to Wife's motion. Instead, he moved to strike the motion, arguing that Wife's notice of appeal from the decree, filed on May 13, 2008, had divested the superior court of jurisdiction. The court agreed and granted the motion to strike. After this court revested jurisdiction in the superior court, the court reviewed Wife's Motion for Reconsideration and for Partial Relief from Judgment and denied it in an unsigned order without explanation. The court issued a signed order denying Wife's motion on March 17, 2009. We have jurisdiction of Wife's appeal from the denial of her motion pursuant to Arizona Revised Statutes ("A.R.S.") Section 12-2101(B)(2003).

## **DISCUSSION**

### **A. Standard of Review.**

¶7 We review the denial of a Rule 85(C) motion for an abuse of discretion. *R.A.J. v. L.B.V.*, 169 Ariz. 92, 94, 817 P.2d 37, 39 (App. 1991). The superior court abuses its

discretion if it misinterprets the law. *Fuentes v. Fuentes*, 209 Ariz. 51, 56, ¶ 23, 97 P.3d 876, 881 (App. 2004). The superior court "is not authorized to act arbitrarily or inequitably, nor to make decisions unsupported by facts or sound legal policy." *City of Phoenix v. Geyler*, 144 Ariz. 323, 328-29, 697 P.2d 1073, 1078-79 (1985). We will uphold the superior court's denial of a motion for relief from judgment unless "undisputed facts and circumstances . . . require a contrary ruling as a matter of law . . . ." *Coconino Pulp & Paper Co. v. Marvin*, 83 Ariz. 117, 121, 317 P.2d 550, 552 (1957) (applying Arizona Rule of Civil Procedure 60(c)).

**B. Confession of Error.**

¶8 Husband failed to file an answering brief on appeal. We could consider this a confession of error. *Thompson v. Thompson*, 217 Ariz. 524, 526 n.1, 176 P.3d 722, 724 n.1 (App. 2008). In our discretion, however, we will decide the appeal on its merits. See *Gibbons v. Indus. Comm'n of Ariz.*, 197 Ariz. 108, 111, ¶ 8, 3 P.3d 1028, 1031 (App. 1999).

**C. Rule 85(C).**

¶9 Wife argues the evidence she discovered after entry of the decree showed that Husband had perjured himself in his trial testimony and had committed a fraud on the court. She argues at the very least she is entitled to an adjustment of the decree

because Husband withdrew nearly \$40,000 more than he had testified to at trial.

¶10 Arizona Rule of Family Law Procedure 85(C) provides for relief from judgment under specific circumstances. It states, in relevant part:

C. Mistake; Inadvertence; Surprise;  
Excusable Neglect; Newly Discovered  
Evidence; Fraud, etc.

1. On motion and upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons:

\* \* \*

b. newly discovered evidence, which by due diligence could not have been discovered in time to move for a new trial under Rule 83(D);

c. fraud, misrepresentation, or other misconduct of an adverse party . . . .

¶11 The superior court gave no explanation for its denial of the Rule 85(C) motion. The superior court is not required to provide a reason for its decisions, but "some explanation, however brief, greatly assists in appellate review, and may prevent unnecessary reversal where facts are close and support for a ruling is not patent from the record." *Geyler*, 144 Ariz. at 329 n.3, 687 P.2d at 1079 n.3. When the superior court provides no legal basis, "we review the decision to see if it is

supported by any reasonable legal basis." *Johnson v. Elson*, 192 Ariz. 486, 489, ¶ 10, 967 P.2d 1022, 1025 (App. 1998).

¶12 As noted, although the superior court directed him to file a response to Wife's Rule 85(C) motion, Husband did not deny the evidence Wife proffered; nor did he argue that it was not "newly discovered," within the meaning of the Rule, or that the reasonable conclusion to be drawn from the evidence was not that he had committed perjury or a fraud on the court.

¶13 In the absence of an answering brief by Husband, we have reviewed the record, including the evidence and testimony presented at trial. As the superior court concluded in entering the original decree, the record contains evidence supporting Husband's testimony that he had used \$56,000 from the line of credit to pay community expenses. The same record, however, contains no evidence to support the proposition that Husband spent the additional \$38,000 he withdrew just before trial on community expenses.

¶14 In fashioning its decree, the superior court relied on Husband's testimony that he had drawn down only \$56,000 from the line of credit and that he had spent those funds on expenses of the community. That evidence formed the basis of the court's equitable division of the parties' community property. We conclude that having been presented with newly discovered evidence that contrary to his sworn testimony, Husband had

withdrawn another \$38,000 from the line of credit, and in the absence of evidence that Husband spent that additional amount on community expenses, the court erred by failing to grant Wife's Rule 85(C) motion.

**CONCLUSION**

¶15 For the foregoing reasons, we reverse the superior court's denial of Wife's Motion for Reconsideration and for Partial Relief from Judgment and remand for further proceedings consistent with this decision.

/s/ \_\_\_\_\_  
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/ \_\_\_\_\_  
PATRICIA A. OROZCO, Presiding Judge

/s/ \_\_\_\_\_  
JON W. THOMPSON, Judge