ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CA06-1161

May 16, 2007

BEVERLY ANN HARRIS
APPELLANT

AN APPEAL FROM SALINE COUNTY CIRCUIT COURT
[DR2005-654-1]

V.

HON. ROBERT W. GARRETT, JUDGE

GREGORY ARNOLD HARRIS
APPELLEE

AFFIRMED

Beverly Ann Harris appeals from the deemed denial of her motion to set aside and vacate a divorce decree and alternative motion for a new trial. She argues that the divorce decree should have been set aside because it did not reflect the parties' agreement regarding the disputed issues related to the divorce. We affirm.

Appellant's then husband, appellee Gregory Harris, filed a complaint for divorce in May 2005, to which appellant responded with a counterclaim for divorce. In November 2005, the trial court entered a temporary order in which it, among other things, granted custody of the parties' three minor children to Mr. Harris and required appellant to pay child support. The matter was set for trial.

The divorce proceeding was not made part of the record in this case. According to appellant, the parties appeared for trial and announced to the trial judge that they had settled their disputed issues relating to the divorce. However, she maintains that the parties neither informed the trial court of the specific terms of the agreement, nor had those terms read into

the record. According to appellant, her attorney was responsible for drafting the precedent and forwarding it to Mr. Harris's attorney. Appellant asserts that, instead, Mr. Harris's attorney "apparently prepared a precedent and forwarded it directly to the court" without her attorney's approval. On the divorce decree, in the signature blank that should contain the signature of appellant's attorney, H. Oscar Hirby, the handwritten words "no objection received" appear, accompanied by unintelligible initials.

The divorce decree was entered on May 4, 2006. On May 15, 2006, appellant filed "a motion to set aside and vacate decree of divorce, entry of amended judgment, and supplemental decree of divorce, and/or new trial." She asserted that the parties announced to the trial court that they had reached "agreements" but that the agreements were not announced or read into the record. She further asserted that her counsel was the party responsible for preparing the precedent.

Appellant requested that the divorce decree be vacated and set aside and that an amended or supplemental decree be issued "consistent with the actual settlement agreements reached by the parties in this cause, and or new trial on the issues attendant and related to the allocation of property, debts and other obligations, payment of taxes, and other unsettled matters." She alleged that Mr. Harris's counsel prepared the precedent and included provisions that were not part of the agreement the parties reached on the morning of the final hearing. She further alleged that the divorce decree was entered without her agreement or the agreement of her counsel. However, appellant did not specify the manner in which the divorce decree failed to properly reflect the terms of the parties' agreement. According to appellant, Mr. Harris failed to file any pleadings in response to her motion to set aside the divorce decree and the trial court failed to rule on her motion, which would mean the motion was deemed denied.

We hold that the trial court did not err in not setting aside or amending the divorce

decree. First, appellant expressly states that she "does not accuse Mr. Harris or his attorney with purposeful or wrongful intent to commit fraud." Because appellant does not argue that the divorce decree was ambiguous or was fraudulently induced, it appears that she is attempting to use parol evidence to improperly vary the terms of the written divorce decree. *See, e.g., Oliver v. Oliver*, 70 Ark. App. 403, 19 S.W.3d 630 (2000) (holding that parol evidence was inadmissible to prove the parties' intent regarding terms of a property settlement agreement and divorce decree because the terms of those documents were not ambiguous). Accordingly, the parol evidence rule would bar extrinsic evidence of the parties' oral settlement agreement.

Second, the trial court was not required to set aside the divorce decree under Rule 60. Appellant incorrectly cites this court to a prior version of Rule 60. The applicable version of Rule 60(a) provides that, within ninety days of the filing of a decree, a trial court may modify or vacate a decree to correct errors or mistakes or to prevent the miscarriage of justice. Whether to grant or deny a motion to vacate or set aside a judgment under Rule 60 lies within the trial court's discretion and will not be reversed unless the trial court has abused that discretion. *See Williams v. First Unum Life Ins. Co.*, 358 Ark. 224, 188 S.W.3d 908 (2004).

Appellant cites to *Carver v. Carver*, 93 Ark. App. 129, __ S.W.3d __ (2005), in which we affirmed a trial court's decision to amend a divorce decree where it was undisputed that the parties intended to include in the decree a provision equally dividing the husband's retirement account but such a provision was inadvertently omitted from the decree. She also cites to *Davis v. Davis*, 291 Ark. 473, 725 S.W.2d 845 (1987). In that case the trial court corrected a judgment that was issued for $24,761.14 but should have been entered for $12,836.14. The *Davis* court held that the preparation of the judgment in excess of what the parties had agreed to was constructive fraud.

Although Rule 60(a) permits trial courts to correct their judgments, this power is

confined to correction of the record to make it conform to the action that was actually taken at the time, and does not permit a decree or order to be modified to provide for action that the court, in retrospect, should have taken, but which, in fact, did not take. *See Carver*, *supra*. In both *Carver* and *Davis*, the terms that were omitted or entered incorrectly were undisputed and the amendments were properly made pursuant to the trial court's power to reflect action that was actually taken at the time the respective decree or judgment was entered.

Accordingly, appellant can prevail on appeal only if she proves both the terms of the parties' agreement and that the trial court adopted the terms of the parties' agreement, thereby showing that the divorce decree should be amended to conform to that action. The divorce decree must stand because appellant fails to prove either. The instant case differs from *Carver* and *Davis* because appellant has not presented undisputed proof regarding the terms of the property settlement. She asserts that because Mr. Harris filed no objection or response to her motion to set aside, we are to interpret that as his admission that her assertions made in the motion to set aside are true – that the divorce decree does not properly reflect the settlement terms to which the parties agreed the morning of the hearing. However, she cites to no authority for this proposition and we are unaware of any authority supporting that a party who fails to file a response to a motion to vacate or set aside thereby admits to the allegations made therein.

Appellant also asserts, pursuant to *Davis*, *supra*, that the submission of the precedent in this case constitutes constructive fraud because the precedent did not accurately reflect the parties' agreement. This argument is unpersuasive because the *Davis* court found constructive fraud where the amount of the trial court's intended judgment was "obvious." The same cannot be said in the instant case, where this court has before it only the divorce decree and appellant's allegations, made in her motion to vacate, that the decree does not reflect the parties' settlement agreement. Her allegations are not substantiated by the record in this case.

Appellant admits that the only evidence in the record that the decree does not comport with the parties' agreement is her motion. Unfortunately for appellant, her motion is insufficient to establish the terms of the parties' settlement agreement or that the trial court adopted those terms.

Appellant conclusorily asserted in her motion that the disputed terms were the allocation of property, debts, and other obligations, the payment of taxes, and "other unsettled matters." However, she failed to inform the trial court in her motion, and fails to inform this court, as to the specific manner in which the settlement agreement differs from the divorce decree. This hardly rises to the level of undisputed proof that was present in *Carver* and *Davis*. It seems axiomatic that where a party asserts that a divorce decree contains terms that differ from a settlement agreement but the trial court never heard the terms of the settlement agreement, that party cannot show which, if any, terms the trial court adopted, much less which of those terms differ from the settlement agreement.

We also affirm because an appellant may not complain on appeal that an action of the trial court is erroneous if she has induced, consented to, or acquiesced in that action. *See Dodson v. Dodson*, 37 Ark. App. 86, 825 S.W.2d 608 (1992). Here, to any extent the divorce decree does not reflect the terms of the parties' settlement agreement, appellant has invited and acquiesced to that error by failing to make the terms of the agreement part of the record in this case or by failing to object to the terms not being made part of the record.

Finally, while appellant argued below that she was entitled to a new trial, we do not address that issue because she has abandoned it on appeal. She asserts entitlement to a new trial in her point heading but she offers no argument in that regard. Instead, her argument focuses on her entitlement to have the divorce decree set aside under Rule 60. *See, e.g., Hale v. State*, 343 Ark. 62, 31 S.W.3d 850 (2000) (declaring an argument abandoned on appeal when appellant mentioned it in the points on appeal but made no argument regarding it).

Affirmed.

BIRD, J., agrees.

PITTMAN, C.J., concurs.