

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

DIVISION III

CA07-604

May 21, 2008

DIANN BUERCKLIN
APPELLANT

AN APPEAL FROM PULASKI
COUNTY CIRCUIT COURT
[PT1999-6430]

V.

HON. MARY SPENCER MCGOWAN,
JUDGE

MICHAEL LANDES
APPELLEE

REVERSED AND REMANDED

This appeal arises from an order purporting to amend an attorney's-fee award in a domestic relations case to hold a different party liable for attorney's fees. After several motions, including motions for a change of custody and to modify visitation, appellant Diann Buercklin was awarded a judgment of \$10,000 in attorney's fees, to be paid by appellee Michael Landes, her son's father. Appellee later filed a motion to set aside the award based on his attorney's conduct in failing to notify him of and failing to defend against the attorney's-fee petition. The motion was initially denied but upon further motion, the circuit court "amended" the original judgment to hold appellee's attorney, Barbara Ketring-Beuch, liable for paying appellant's attorney's fees. Appellant thereafter filed a motion for a new trial, which was denied.

Appellant appeals from the order purporting to modify the original judgment. She argues that the circuit court erred in three respects: 1) in relitigating appellee's motion to set aside the attorney's-fee award; 2) in amending the fee award more than ninety days after it was entered; and 3) in relieving appellee of his personal obligation to pay attorney's fees. Because we agree with appellant's second argument, we reverse the amended order and remand for the circuit court to enter an order granting appropriate relief consistent with this opinion, to reflect that appellee remains personally liable to pay appellant's attorney's fees.

I. Facts

This appeal determines who will pay appellant's attorney's fees – appellee or his former attorney, Barbara Ketring-Beuch. The circuit court shifted the obligation to Ms. Ketring-Beuch, appellee's attorney, because she failed to apprise appellee that a motion for attorney's fees had been filed and that she asked the order to be set aside.

The facts leading to the circuit court's decision are best summarized in chronological format, as follows:

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| 2001 | Appellant is awarded custody of the parties' child. |
| 10/11/04 | Hearing to consider appellee's motion for a change of custody and appellant's counter-motion to modify appellee's visitation and to increase his child-support obligation; appellee is represented by Ms. Ketring-Beuch; appellant prevails. |
| 1/27/05 | Appellee pays Ms. Ketring-Beuch a \$250 retainer to represent him regarding future developments in his case. |
| 3/2/05 | Ms. Ketring-Beuch is suspended from the practice of law for failing to pay her licensing fee and failing to complete her continuing legal education requirements. |
| 4/29/05 | Appellant petitions for attorney's fees; Ms. Ketring-Beuch does not |

- respond on appellee's behalf.
- 5/17/05 Ms. Ketring-Beuch's suspension is lifted.
- 5/24/05 Ms. Ketring-Beuch informs appellee that no new visitation order has been entered.
- End of May Appellee receives a new visitation order, indicating that he owed appellant's attorney \$200 in "court fees," which appellee pays.
- 6/20/05 The circuit court enters the original judgment awarding appellant \$10,000 in attorney's fees.
- 6/30/05 Ms. Ketring-Beuch filed a motion to set aside the attorney's-fee award.
- 11/4/05 Circuit court enters an order denying appellee's motion to set aside the attorney's-fee award.
- 3/27/06 Appellant filed a contempt motion due to appellee's failure to pay attorney's fees pursuant to the June 20, 2005 order; the motion was later granted.
- 4/19/06 After receiving notice of the contempt order, appellee obtained his case file from the county clerk's office.
- 5/5/06 Having obtained new counsel, appellee files a multi-part motion including, *inter alia*, a motion to set aside the June 20, 2005 order.
- 2/22/07 Hearing on appellee's motions, during which Ms. Ketring-Beuch testified regarding why she failed to notify appellee of the petition for attorney's fees and failed to prosecute the matter.
- 3/27/07 Circuit court enters an order purporting to amend the November 4, 2005 order, pursuant to Ark. R. Civ. P. 60(c)(4), which permits modification of a judgment or order based on misrepresentation or fraud by an adverse party; the court amended the order to require Ms. Ketring-Beuch to pay \$10,000 in attorney's fees to appellant's attorney.
- 4/6/07 Appellant filed a motion for a new trial, asserting that the circuit court erred in amending the June 20, 2005 order more than ninety days after its entry based on fraud by an adverse party because Ms. Ketring-Beuch was not a party adverse to appellee.

05/08/07 The circuit court enters an order denying appellant's request for a new trial, asserting its jurisdiction to amend the order pursuant to Rule 60(c)(4).

Appellant now appeals solely from the March 27, 2007 order amending the original judgment to require appellee's attorney to pay appellant's attorney's fees.

II. Jurisdiction to Amend the Attorney's-Fee Award

Appellant's primary argument is that pursuant to Rule 60(c)(4), the circuit court lost jurisdiction to amend the attorney's-fee award after ninety days. Rule 60(c)(4) provides that a circuit court may set aside a judgment after ninety days for misrepresentation or fraud by an adverse party. The original judgment awarding appellant attorney's fees was entered on June 20, 2005. The order purporting to amend the award of attorney's fees was entered on March 27, 2007, approximately twenty-one months after the original judgment was entered. Accordingly, the circuit court had jurisdiction to amend the original judgment only if Ms. Ketring-Beuch was an adverse party who committed fraud or misrepresentation. *See O'Marra v. Mackool*, 361 Ark. 32, 204 S.W.3d 49 (2005).

The elements of fraud and misrepresentation are essentially the same, as follows: (1) a false representation of a material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation; (4) justifiable reliance on the representation; and (5) damage suffered as a result of the reliance. *See Bullock v. Barnes*, 366 Ark. 444, 236 S.W.3d 498 (2006); *O'Mara v. Dykema*, 328 Ark. 312, 942 S.W.2d 854 (1997).

In the amending order, the circuit court expressly cited to Rule 60(c)(4), and further cited to Ms. Ketring-Beuch's conduct in failing to apprise appellee that appellant had filed a

motion for attorney's fees and that Ms. Ketring-Beuch had asked that the order be set aside. Nonetheless, even if we assume that Ms. Ketring-Beuch's conduct constituted a false representation of a material fact, the circuit court made no finding that Ms. Ketring-Beuch was an adverse party and made no findings regarding the remaining elements of fraud or misrepresentation to support its application of Rule 60(c)(4).

Hence, because there was insufficient proof of fraud or misrepresentation by an adverse party, the circuit court lacked jurisdiction under Rule 60(c)(4) to amend the judgment awarding attorney's fees after ninety days. *See Mackool, supra*. In turn, this means that appellee remains personally obligated to pay appellant's attorney's fees pursuant to the June 20, 2005 order, which is the standing order in this case.¹

Because we hold that the circuit court lacked jurisdiction to amend the June 20, 2005 order, we do not address appellant's remaining arguments that the circuit court erred in relitigating the motion to set aside the attorney's-fee award and in relieving appellee of his personal obligation to pay her attorney's fees.²

Reversed and remanded for the circuit court to enter relief consistent with this opinion.

¹Although the circuit court purported to amend the November 4, 2005 order, the order actually implicated was the June 20, 2005 order, as the language contained in the amending order tracks the language in the June 20, 2005 order, not the November 4, 2005 order. The circuit court should resolve this matter on remand.

²We observe that Ark. Code Ann. § 16-22-310(a)(1) (Supp. 2007) provides that, unless fraud or misrepresentation is shown, an attorney is not liable to a person not in privity with the attorney for acts, omissions, decisions, or other conduct in connection with professional services performed by the attorney.

GLADWIN and BAKER, JJ., agree.