

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA11-265

SUZANNE P. DEW

APPELLANT

V.

TERRY L. DEW

APPELLEE

Opinion Delivered February 8, 2012

APPEAL FROM THE JOHNSON
COUNTY CIRCUIT COURT,
[NO. DR-2008-190]

HONORABLE DENNIS CHARLES
SUTTERFIELD, JUDGE

AFFIRMED

JOHN MAUZY PITTMAN, Judge

This is one of two cases decided today that involve the divorce of appellant Suzanne Dew and appellee Terry Dew. The procedural history is set forth in *Dew v. Dew*, 2012 Ark. App. 122, 390 S.W.3d 764. Suzanne appeals from the circuit court's denial of her motion for new trial. We affirm.

The circuit court entered the divorce decree on May 14, 2010. On November 12, 2010, Suzanne filed a motion for new trial pursuant to Arkansas Rule of Civil Procedure 60(c)(1). She alleged that she did not have access to Terry's 2009 tax returns until October 2010; that the divorce decree did not address the prepaid taxes for 2009 or 2010; that she could not have known that he had claimed all of the marital prepaid taxes for 2009 as his individual assets; and that the court had committed an error of law in not dividing those assets equally between the parties. Terry responded that the trial court had distributed the prepaid taxes for 2009 to him in the divorce decree and denied that Suzanne had been unaware of his



claim to them. He explained:

In the affirmative, the plaintiff states that \$115,500 in prepaid income taxes was listed on line 38 of Substituted Plaintiff's Exhibit N admitted during the trial of this case, increasing the value of the assets in AVX to \$264,659. The prepaid income taxes were included in the total value of the assets in AVX in Plaintiff's Exhibit 3 admitted during the hearing on April 16, 2010, and the defendant received one-half of the prepaid income taxes in the cash equalization of the division of marital assets as outlined in Plaintiff's Exhibit 3. The plaintiff admits that the federal and state tax payments in 2010 were not divided by the Court, and in the affirmative, he states that income earned and payments made after the trial of the case are not subject to division.

After a hearing, the court denied the motion for new trial. Suzanne took a timely appeal from that order.

Suzanne argues that the trial court abused its discretion in denying her motion for new trial on the basis of newly discovered evidence, because she first learned of Terry's claim to all of the prepaid taxes for 2009 in October 2010, when he filed his tax returns. Under Arkansas Rule of Civil Procedure 60(c)(1) (2011), a new trial may be granted and a prior order set aside where the grounds were discovered after the expiration of the ninety-day limitation, or where the ground is newly discovered evidence that the moving party could not have discovered in time to file a motion under Arkansas Rule of Civil Procedure 59(b) (2011). A party is not, however, entitled to relief under Rule 60(c) if diligence has not been exercised in protecting her interests. *New Holland Credit Co. v. Hill*, 362 Ark. 329, 208 S.W.3d 191 (2005); *Jones-Blair Co. v. Hammett*, 326 Ark. 74, 930 S.W.2d 335 (1996).

The trial court did not abuse its discretion in denying Suzanne's motion. Scotty White, a CPA, testified at trial that quarterly tax estimates for 2009 would be \$32,000, and that, in preparing the parties' 2008 federal tax return, he requested that the refund of \$39,115



(listed on line 74 of the return) be applied to the estimated taxes for 2009. White also mentioned estimated taxes for 2009 in relation to Plaintiff's Exhibit Q, which compared Terry's 2008 income and his anticipated income in 2009. In calculating the equalization of the parties' total assets and liabilities, the circuit court referred in the decree to Plaintiff's Exhibit O, the "Assets and Liabilities Summary" based upon Plaintiff's Exhibit N. In Plaintiff's Exhibit N, there was no amount set forth for prepaid taxes, and the "Total Current Assets" were listed as \$149,159.83. Terry also presented a summary of the division of assets at the April 16, 2010 hearing, which provided for a "Cash Equalizer" payment of \$51,631 to Suzanne. Substituted Plaintiff's Exhibit N, which corresponded to this summary, set forth the assets of AVX (Terry's surgery business); on line 38, it listed \$115,500 in "Prepaid Income Taxes"; this figure was included in the "Total AVX—Current Assets" amount of \$264,659.83. Additionally, Suzanne asked at trial for an equal division of the prepaid income taxes. It is, therefore, clear that she had more than sufficient opportunity to develop this issue at trial, and that the trial court did value and distribute the prepaid taxes as an asset of Terry's business in the decree.

Affirmed.

ROBBINS and GLOVER, JJ., agree.

Tripcony Law Firm, P.A., by: *James L. Tripcony*, for appellant.

Coplin, Hardy & Stotts, LLC, by: *Barry E. Coplin* and *Jocelyn A. Stotts*, for appellee.