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# ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

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2170423

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Eduardo Enrrique Rel

v.

Carolina Rel

Appeal from Mobile Circuit Court  
(DR-16-900532)

PITTMAN, Judge.

Eduardo Enrrique Rel ("the husband") appeals from an amended divorce judgment entered by the Mobile Circuit Court ("the trial court") insofar as that judgment awarded Carolina

2170423

Rel ("the wife") \$35,000 from the husband's retirement accounts. We reverse and remand.

Procedural History

In April 2016, the wife sued the husband for a divorce, seeking, among other things, a division of the husband's retirement accounts. The action was tried on February 16, 2017. Before the wife called her first witness at the trial, the following colloquy occurred:

"THE COURT: What is the date of marriage?

"[The wife's counsel]: February 7, 2002.

"THE COURT: And when did the retirement, when did that start accruing?

"[The husband's counsel]: Early '90's.

"THE COURT: And do you have your accountant ready to reflect what was earned during the marriage?

"[The wife's counsel]: We do not, Your Honor. We asked [the husband] in discovery what was in it at the time of the marriage and he said he didn't know. I haven't subpoenaed anything so I don't have that.

"THE COURT: Let me see the attorneys in my office.

"(Off the record discussion in chambers.)

"(Back on the record.)

2170423

"THE COURT: All right. Call your first witness.

"And let the record reflect that the Court will not be dividing the retirement today because there is not going to be evidence to determine what amount was accrued during the marriage, so let's begin."

The trial court then proceeded to receive evidence.

During the husband's testimony, he testified as follows:

"THE COURT: And then your retirement of \$147,000, I said earlier that this was a problem because there was no -- not going to be any evidence of how much was accrued during the marriage, and on your exhibit you say it's worth \$147,000 now, right?

"[The husband]: Yes, ma'am.

"THE COURT: And do you have any information regarding how much was accrued during the marriage?

"[The husband]: No, ma'am. I have the account[s] but ....

"THE COURT: Okay. What year did you start the job?

"[The husband]: At Providence, it was around 1991, started retirement around '92, '93."

No evidence tending to prove what portion of the husband's retirement accounts had accrued during the marriage was introduced at the trial; when both parties had rested their cases-in-chief, the trial court adjourned the trial rather than recessing it until a later date.

2170423

On February 24, 2017, the trial court entered a final judgment adjudicating all the parties' claims. With respect to the husband's retirement accounts, the judgment provided: "The husband is awarded his retirement."

The wife subsequently employed new counsel, who, on March 23, 2017, filed a notice of appearance and a motion titled "Motion for New Trial and/or Motion to Reconsider." That motion did not assert that the trial court had erred in awarding the husband his retirement accounts in toto. On June 6, 2017, the wife filed a motion titled "Motion to Amend Rule 60," which stated:

"Comes now [the wife and] moves this Honorable Court for an Order modifying its Order of February 24, 2017 in this matter. As grounds and support the undersigned [shows] to this Court as follows:

"1. That the [wife] states that the [husband] had ... retirement account[s] at the time of the trial that was not divided as part of the Judgment of Divorce.

"2. [The wife] states that the retirement account[s] [were] part of the marital estate given the long term marriage between the parties and subject to division [between] the parties.

"Wherefore, the [wife] respectfully moves this Honorable Court to order that the [wife] herein receive one half of the [husband's] retirement and for the Judgment of Divorce be amended to include same; [the wife] prays for such other, further and

2170423

different relief to which she may be entitled, premises considered."

On June 8, 2017, the wife filed a motion titled "Amended Motion to Amend Rule 60" in which she again asserted that she was entitled to one-half of the funds in the husband's retirement accounts for the same reasons stated in her "Motion to Amend Rule 60." The trial court initially set the wife's motions for a hearing on June 14, 2017; however, that hearing was continued, and the trial court entered an order stating that both parties had expressly consented to the extension of the 90-day period for the trial court to rule on the wife's motions pursuant to Rule 59.1, Ala. R. Civ. P. The trial court subsequently held a hearing on June 29, 2017, regarding the wife's motions. At that hearing, the wife's counsel made the following argument regarding the husband's retirement accounts:

"On the Rule 60 motion specifically, I think it's uncontested that there [were] retirement account[s] of the husband's. I have not asked for leave to do discovery on that yet but I would ask the Court to let me send a subpoena to his employer to find out what the parameters are on the retirement account[s] and what's in [them].

"They were married for a long period of time. It was a long-term marriage, 15 years, and so certainly that should be part of the marital estate.

"[The wife] got very little financial remuneration in the case. Although she did get an alimony payment, she did not get any share whatsoever of the retirement account[s]. I have been told how that happened at trial and I just think that's very unfair to her. It's not her fault that evidence was not presented in that regard at trial. There is an avenue for you to amend that judgment and to rectify that and I would ask that I be allowed to do some post-judgment discovery and put that before the Court for a proper division of the retirement account[s]."

In response, the husband's counsel argued:

"Now, on the Rule 60 motion, Judge, if you'll recall, [the husband] was employed where he accumulated retirement prior to his marriage to [the wife]. You asked us at the beginning of the trial what the assets were and they said he has ... retirement account[s]. And I said, 'Judge, I object to that. They can't prove the retirement benefits accumulated during this marriage.' You called us up there. You asked [the counsel representing the wife at the trial] if he wanted to continue the case to get that evidence and he said no, and you said, 'Okay. We're going to try the case then.'

"He couldn't prove the retirement benefits accumulated during the marriage. He couldn't meet the evidentiary burden required to get any retirement benefits, that's why they weren't included for [the wife], Judge."

On June 30, 2017, the trial court entered an order denying the wife's motions except insofar as she sought relief with respect to the husband's retirement accounts. With

2170423

respect to the husband's retirement accounts, the trial court's June 30, 2017, order stated:

"The court will reopen the case to hear additional evidence as to the amount of the retirement funds that may be considered marital funds. The court will allow additional evidence to be discovered for this asset only.

"2. The case shall be reopened to allow this additional evidence to be presented to the court ...."

Thereafter, the wife conducted discovery regarding the husband's retirement accounts and employed an expert to testify regarding the value of the portion of the husband's retirement accounts that had been accumulated during the marriage. On August 29, 2017, the husband submitted a brief in which he asserted, among other things, that the trial court had erred in reopening the evidence because the evidence the wife sought to introduce could have been discovered before the trial by the exercise of reasonable diligence.

On November 7, 2017, the trial court held a hearing at which the wife introduced testimony by her expert witness regarding the value of the portion of the husband's retirement accounts that had been accumulated during the marriage. On November 8, 2017, the trial court entered an order amending

2170423

its February 24, 2017, judgment to provide that the wife was awarded \$35,000 out of the husband's retirement accounts and that the husband was awarded the remainder of the funds in his retirement accounts. The husband timely filed a Rule 59(e), Ala. R. Civ. P., motion to alter, amend, or vacate the judgment. Among other things, the husband's motion alleged:

"The wife did not satisfy the evidentiary requirements of Ala. Code [1975, §] 30-2-51(b) at trial or otherwise prior to the entry of a final Judgment of Divorce on 2/24/17. The Court was without legal authority, jurisdiction, or an equitable basis to subsequently reopen the evidence to provide the wife another opportunity to attempt to meet the evidentiary requirements for an award from the husband's retirement benefits. Evidence concerning said retirement benefits submitted after 2/24/17 should not be considered. The Court had no authority (see, e.g., Ala. Code [1975, §] 6-8-103) to reopen the evidence after entry of judgment on 2/24/17 and abused its discretion in that regard.

"... At the trial of this matter on the 16th of February, 2017, the Court specifically asked counsel for the [wife] if they were prepared to present an accountant to offer evidence concerning the present value of the [husband's] retirement benefits which had been accumulated during the marriage as a large portion had been acquired by the [husband] pre-marriage. [The wife's] counsel stated on the record that they were not prepared to do so. At that point, the Court took the attorneys into her office, and the trial court gave the [wife] an opportunity to have the case reset in order to obtain evidence concerning the [husband's] retirement accounts. The [wife], through counsel, declined the continuance offered by the trial court.

"Subsequently, the trial court stated on the record, 'And let the record reflect that the Court will not be dividing the retirement account[s] today because there is not going to be sufficient evidence to determine what amount was accrued during the marriage, so let's begin.' (R. 6-7). It is clear based on the preceding that the [wife] unequivocally waived her opportunity to present evidence concerning the [husband's] retirement account[s] and [their] potential division as part of the marital estate. Further, it is clear by the Court's own language that this waiver was accepted. In addition, the [husband] relied upon this waiver in the presentation of this case to the Court subsequent to the waiver. On February 24th, 2017, the Court entered a Judgment of Divorce in which the [husband] was awarded his retirement account balances based upon the [wife's] waiver at trial. In other words, during the trial and before entry of the final judgment, the [wife] waived any claim for a share of the [husband's] retirement benefits and should be estopped from subsequently seeking the same."

(Bold typeface omitted.) On December 13, 2017, the trial court entered an order denying the husband's Rule 59(e) motion; the husband timely appealed to this court.

#### Analysis

The husband first argues that the trial court erred in reopening the evidence to allow the wife to discover and introduce evidence that she could have discovered before trial and introduced at the trial on February 16, 2017. We agree.

The wife's motion titled "Motion for New Trial and/or Motion to Reconsider," which she filed within 30 days after

2170423

the entry of the February 24, 2017, final judgment was a Rule 59, Ala. R. Civ. P., motion. See, e.g., Curry v. Curry, 962 So. 2d 261, 263 (Ala. Civ. App. 2007) ("The mother's motion, which was filed within 30 days after the entry of the trial court's amended judgment and which requested that court to 'reconsider' that amended judgment, was, in substance and in legal effect, a motion to alter, amend, or vacate the judgment pursuant to Rule 59(e), Ala. R. Civ. P."). The wife's "Motion to Amend Rule 60" and "Amended Motion to Amend Rule 60," which were filed during the pendency of the wife's timely filed Rule 59 motion, were in substance and legal effect, amendments to the wife's Rule 59 motion. Id. ("Although the mother's October 20, 2005, motion cited Rule 60(b), Ala. R. Civ. P., as authority, '[t]he "character of a [motion] is determined and interpreted from its essential substance, and not from its descriptive name or title."' Ex parte Alfa Mut. Gen. Ins. Co., 684 So. 2d 1281, 1282 (Ala. 1996) (quoting Union Springs Tel. Co. v. Green, 285 Ala. 114, 117, 229 So. 2d 503, 505 (1969))."); and Kulakowski v. Cowart, 220 So. 3d 304, 313 (Ala. Civ. App. 2016) ("A trial court may allow a party to add additional grounds for his or her postjudgment motion more

2170423

than 30 days after entry of the judgment to which the postjudgment motion is directed so long as the original postjudgment motion remains pending before the trial court.").

"A trial court has the authority to alter, amend, or vacate a judgment on its own motion within 30 days after the entry of that judgment. Pierce v. American Gen. Fin., Inc., 991 So. 2d 212, 215 (Ala. 2008). In addition, 'a trial court retains the power to correct sua sponte any error in its judgment that comes to its attention during the pendency of a party's Rule 59(e) motion to alter, amend, or vacate the judgment, regardless of whether the error was alleged or not alleged in the motion.' Henderson v. Koveleski, 717 So. 2d 803, 806 (Ala. Civ. App. 1998)."

Ex parte DiGeronimo, 195 So. 3d 963, 968 (Ala. Civ. App. 2015). However, in the present case, there was no error in the trial court's February 24, 2017, final judgment insofar as it awarded the husband his retirement accounts in toto. Under the law applicable to this case, because the wife did not seek a continuance of the February 16, 2017, trial, she bore the burden of proving at that trial the amount of the funds in the husband's retirement accounts that had accrued during the marriage. See, e.g., Payne v. Payne, 48 So. 3d 651, 653 (Ala. Civ. App. 2010) ("In cases in which the spouse seeking the award of benefits has not proven the amount of retirement benefits accrued during the marriage, we have held that that

2170423

failure of proof prevents a trial court from exercising its discretion to award retirement benefits under the statute.' Ford v. Ford, 3 So. 3d 872, 874 (Ala. Civ. App. 2008).").<sup>1</sup> The failure to discover evidence that could have been discovered before the trial by the exercise of reasonable diligence is not a cognizable ground for reopening the evidence or for granting a new trial. See, e.g., Adams v. State, 428 So. 2d 117, 119 (Ala. Civ. App. 1983) ("Our case law requires, among other criteria, that in order to grant a new trial on the basis of newly discovered evidence it must be established the evidence could not have been discovered before the trial by the exercise of due diligence."). Likewise, in a civil action in which a party is represented by retained counsel, ineffective assistance of counsel is not a cognizable ground for reopening the evidence or for granting a new trial. See

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<sup>1</sup>Act No. 2017-162, Ala. Acts 2017, amended § 30-2-51(b), Ala. Code 1975, effective January 1, 2018, to provide, in part:

"(3) Any party asserting that all or a portion of his or her interest in any retirement benefits is excluded from the marital estate shall bear the burden of proving that fact and the value or amount of the excluded interest, including any active or passive income or appreciation on that interest."

2170423

Rickard v. Rickard, 57 Ala. App. 617, 618, 330 So. 2d 441, 442 (1976) (holding that, when the appellant had been represented at trial by counsel of his choice, ineffective assistance of counsel was not a valid ground for reversing a judgment because the guarantee of effective assistance of counsel provided by the Sixth Amendment of the United States Constitution applies only to criminal actions). Thus, in the present case, no valid basis for reopening the evidence or for granting a new trial existed. Therefore, we reverse the judgment of the trial court and remand the cause for further proceedings consistent with this opinion. The husband's motion for an attorney-fee award on appeal is denied.

REVERSED AND REMANDED.

Thomas, Moore, and Donaldson, JJ., concur.

Thompson, P.J., concurs specially.

2170423

THOMPSON, Presiding Judge, concurring specially.

I write separately to note that a recent change in the applicable law will operate to change the result of cases similar to this one in the future. Section 30-2-51, Ala. Code 1975, has been amended effective January 1, 2018, i.e., after the date on which the judgment at issue in this appeal was entered. See Act No. 2017-162, Ala. Acts 2017.<sup>2</sup> That

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<sup>2</sup>The new § 30-2-51, Ala. Code 1975, provides:

"(a) If either spouse has no separate estate or if it is insufficient for the maintenance of a spouse, the judge, upon granting a divorce, at his or her discretion, may order to a spouse an allowance out of the estate of the other spouse, taking into consideration the value thereof and the condition of the spouse's family. Notwithstanding the foregoing, the judge may not take into consideration any property acquired prior to the marriage of the parties or by inheritance or gift unless the judge finds from the evidence that the property, or income produced by the property, has been used regularly for the common benefit of the parties during their marriage.

"(b)(1) The marital estate is subject to equitable division and distribution. Unless the parties agree otherwise, and except as otherwise provided by federal or state law, the marital estate includes any interest, whether vested or unvested, either spouse has acquired, received, accumulated, or earned during the marriage in any and all individual, joint, or group retirement benefits including, but not

limited to, any retirement plans, retirement accounts, pensions, profit-sharing plans, savings plans, annuities, or other similar benefit plans from any kind of employment, including, but not limited to, self employment, public or private employment, and military employment.

"(2) Notwithstanding the foregoing, unless the parties agree otherwise, the total amount of the retirement benefits payable to the noncovered spouse shall not exceed 50 percent of the retirement benefits that may be considered by the court.

"(3) Any party asserting that all or a portion of his or her interest in any retirement benefits is excluded from the marital estate shall bear the burden of proving that fact and the value or amount of the excluded interest, including any active or passive income or appreciation on that interest.

"(c) The court may use any method of valuing, dividing, and distributing an interest in retirement benefits that is equitable under the circumstances of the case so long as the overall division and distribution of the marital property remains equitable to the parties. Nothing in this section shall be construed to require a court to divide or distribute any amount, or any percentage, of one spouse's retirement benefits to the other spouse.

"(d) Any passive increase or decrease in the value of retirement benefits from the effective date of the award to the date of distribution shall accrue to, or be borne by, the parties on a pro rata

2170423

amendment to § 30-2-51 deleted the requirement that parties be married for 10 years before a spouse could claim an interest in the other's retirement benefits accrued during the marriage and the requirement that the "present value" of the interest in the retirement account be proven. Rather, as now amended, § 30-2-51 allows, under the discretion of the trial court, the division of retirement benefits accrued during the marriage, regardless of the length of the marriage, as a part of the trial court's equitable division of marital assets. § 30-2-

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basis. Passive increases or decreases are increases or decreases resulting from fluctuations in the value of the assets regarding a retirement benefit and cost-of-living adjustments made pursuant to the terms of a retirement benefit, but do not include any increases or decreases resulting from contributions, withdrawals, or accruals to a retirement benefit attributable to any period, after the effective date of the award.

"(e) Unless otherwise prohibited by state or federal law, a court may enter any order designed to protect or preserve the legal interest of either spouse in retirement benefits, including any order to prevent, or to compensate a spouse for, the deprivation or dissipation of a legal share of any retirement benefits due to the act or omission of the other spouse and any order necessary to enforce the property division of such benefits. Notwithstanding the foregoing, a court may not enter any order modifying the terms of any retirement benefits or enlarging the benefits payable under the terms of a retirement plan."

2170423

51(b). The trial court is no longer limited to evidence concerning the present value of retirement benefits and may instead use any reasonable method for determining the value of any retirement benefits to be divided. § 30-2-51(c), Ala. Code 1975. Further, the burden is now on the party objecting to a division of retirement benefits to prove that those benefits, or a portion of them, are not subject to division in a divorce. § 30-2-51(b)(3).

Because the newly amended § 30-2-51 was not in effect at the time of the judgment and orders entered in this appeal, however, that statute, as amended, is not applicable to this case. Given the then applicable law and the arguments presented to the trial court, I concur with the main opinion.