IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID HOWARD,[1]	§	
	§	No. 268, 2008
Petitioner Below-Appellant,	§	
	§	
	§	Court Below–Family Court
v.	§	of the State of Delaware
	§	in and for Kent County
PAULETTE J. HOWARD,	§	File No. CK93-4901
	§	Petition No. 07-23224
Respondent Below-Appellee.	§	
	§	

Submitted: April 10, 2009
Decided: April 28, 2009

Before **HOLLAND**, **BERGER** and **JACOBS**, Justices

O R D E R

This 28th day of April 2009, upon consideration of the Family Court's order following remand, the supplemental briefs of the parties, and the record below, it appears to the Court that:

(1) The petitioner-appellant, David Howard ("Father"), filed an appeal from the Family Court's May 2, 2008 order denying his motion to reargue and reopen the Family Court's January 30, 2008 child support order. Following the filing of Father's opening brief, which claimed that the Family Court abused its discretion by failing to provide reasons for its

[1] This Court sua sponte assigned pseudonyms to the parties by Order dated May 29, 2008. Supr. Ct. R. 7(d).

decision, the respondent-appellee, Paulette J. Howard ("Mother"), filed a motion to stay the briefing schedule and a motion to remand the matter to the Family Court so that the reasons for its decision could be supplied. Father filed a response stating that he had no objection to Mother's motions. On September 2, 2008, the Court stayed the briefing schedule and remanded the matter to the Family Court. On September 19, 2008, the Family Court issued its decision following remand. The parties then filed supplemental briefs. Based upon the reasoning provided by the Family Court, we conclude that Father's motion was properly denied. Accordingly, we AFFIRM the judgment of the Family Court.

(2) The record reflects that, on January 30, 2008, a Family Court Commissioner entered a child support order requiring Father to pay child support in the amount of $370.00 per month on behalf of his and Mother's minor child.[2] On February 8, 2008, Father filed a request for review of the Commissioner's order.[3] On March 11, 2008, the Family Court denied Father's request for review on the ground that Father had failed to provide a transcript as required by Rule 53.1(c).[4] It was then that Father filed his

[2] That amount represents $346.00 per month in current support and $24.00 per month in arrears. Father previously was ordered to pay $86.00 per month in support pending the Commissioner's hearing, when an attempt at mediation failed.
[3] Del. Code Ann. tit. 10, § 915(d) (1); Fam. Ct. R. Civ. Proc. 53.1.
[4] In his request for review, Father certified that he would pay the cost of preparing the transcript of the hearing. When payment was not made, the Family Court notified Father

motion to reargue and reopen on two grounds: first, that he never received the Family Court's notice requiring him to furnish a transcript in connection with his appeal of the Commissioner's order and, second, that the Commissioner erroneously attributed too much income to him when calculating his child support obligation.

(3) The Family Court's September 19, 2008 order following remand denied Father's motion to reargue and reopen on two procedural grounds. The first ground was Father's failure to furnish the Family Court with a transcript in connection with his appeal from the Commissioner's order, as required by Rule 53.1(c), despite proper notification from the Family Court. As support for its decision, the Family Court stated that both the bill for the cost of the transcript and the Division of Child Support Enforcement's response to Father's appeal were mailed to Father at his last-known address. Neither item was returned to the court as undeliverable. Moreover, the bill clearly stated that Father was responsible for the cost of the transcript and that a failure to comply could result in dismissal of the appeal.

(4) The Family Court's second ground for denying Father's motion was Father's failure to comply with Rule 60 when moving to reopen a

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on February 13, 2008 that, if payment were not received within 15 days, his request for review would be dismissed. Father did not respond to the Family Court's notice.

proceeding based upon newly discovered evidence. As support for its decision, the Family Court stated that the Commissioner properly imputed a salary of $30,000 a year to Father, who is self-employed in car repair, based upon Father's testimony at the child support hearing that he would be making approximately $25,000 to $30,000 a year if he were employed by a car dealer. The record reflects that when Father arrived at the hearing, he had no documentation regarding his income and stated that he was unaware he had to bring any. In the absence of any other evidence regarding Father's income, the Commissioner relied on Father's testimony, as well as a financial report and 2006 tax return regarding Father's business that were found in the Family Court's file. Following the issuance of the Commissioner's order, Father made phone calls to several local auto detailing services to find out what salaries they paid. On that basis, Father argued that $30,000 was too high a figure and the case should be reopened for a new child support calculation.

(5) In this appeal, Father claims that a) his due process rights were violated because he did not receive notice from the Family Court of his obligation to furnish a transcript in connection with his appeal from the Commissioner's order; and b) the Family Court should have reopened the proceedings for a re-calculation of his child support obligation. To the

extent that Father has not argued other grounds to support his appeal that were previously raised, those grounds are deemed waived and will not be considered by this Court.[5]

(6) This Court's review of appeals from the Family Court extends to a review of the facts and the law as well as a review of the inferences and deductions made by the judge.[6] This Court will not disturb findings of fact unless they are clearly wrong and justice requires that they be overturned.[7] If the Family Court has correctly applied the law, our standard of review is abuse of discretion.[8] Errors of law are reviewed de novo.[9]

(7) Motions for reargument in the Family Court are governed by Rule 59(e). That rule provides in part that a motion for reargument shall be filed in the Family Court within 10 days following the filing of the Family Court's order. The record reflects that the Family Court's order dismissing Father's request for review of the Commissioner's order was dated and docketed March 11, 2008. Father's motion was not filed until March 27, 2008, beyond the required 10-day period. As such, the Family Court did not

[5] *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993). In his motion filed in the Family Court, Father also claimed that the information regarding Mother's income presented at the hearing was incorrect; his 2006 business tax information was improperly obtained and entered into evidence at the hearing; and Mother violated the original support order by cancelling her health insurance.
[6] *Wife (J.F.V.) v. Husband (O.W.V., Jr.)*, 402 A.2d 1202, 1204 (Del. 1979).
[7] *Solis v. Tea*, 468 A.2d 1276, 1279 (Del. 1983).
[8] *Jones v. Lang*, 591 A.2d 185, 186 (Del. 1991).
[9] *In re Heller*, 669 A.2d 25, 29 (Del. 1995).

have jurisdiction to entertain the untimely filing.[10] We, therefore, affirm the Family Court's denial of Father's motion for reargument, albeit on grounds different from those relied upon by the Family Court.[11]

(8) Motions to reopen in the Family Court are governed by Rule 60(b). That rule provides, in part, that the Family Court may relieve a party from a final judgment on the basis of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Moreover, a party seeking relief under Rule 60(b) must demonstrate the following: a) excusable neglect in the conduct that resulted in the order of dismissal; b) that the outcome of the action may be different, if relief is granted, from what it will be if the judgment is permitted to stand; and c) that the nonmoving party will not suffer substantial prejudice if the motion is granted.[12] To constitute excusable neglect, the conduct of the moving party must have been that of a reasonably prudent person.[13]

(9) We conclude that Father has demonstrated neither that the evidence he seeks to have considered is "newly discovered" nor that his

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[10] *McDaniel v. DaimlerChrysler Corp.*, 860 A.2d 321, 323 (Del. 2004); Fam. Ct. R. Civ. P. 6(b).
[11] This Court may affirm a trial court's ruling on grounds different from those relied upon by the trial court. *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1390 (Del. 1995).
[12] *Donahue v. Donahue*, Del. Supr., No. 63, 2005, Ridgely, J. (June 16, 2005) (citing *Reynolds v. Reynolds*, 595 A.2d 385, 389 (Del. 1991)).
[13] Id. (citing *Battaglia v. Wilmington Sav. Fund Soc.*, 379 A.2d 1132, 1135 (Del. 1977).

failure to provide documentary evidence at the Commissioner's hearing was the result of "excusable neglect" by a "reasonably prudent person." There is no evidence that Father was not properly notified of the Commissioner's hearing on January 30, 2008. In addition, Father knew that a previous attempt at mediation had failed and that he had been assessed $86.00 per month in child support pending the Commissioner's hearing. Thus, he was on notice that he would be responsible for some level of child support and that the Commissioner would determine, based upon the evidence presented at the hearing, what level of support was owed. Moreover, the record reflects that the parties have been involved in litigation since 1995 and, specifically, in child support litigation since 1996. The latest support petition was filed by Mother in July 2007. It defies reason to believe that Father was not aware that he had to provide documentation in support of whatever arguments he intended to present to the Commissioner. In the absence of any documentation from Father, the Commissioner was within his discretion to rely on documentation from the Family Court's file and the testimony of the parties. As such, we affirm the Family Court's denial of Father's motion to reopen.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Family Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice