275 Ga. at 257(1), 258, n. 19, 564 S.E.2d 715; cf. *Ga. Dept. of Transp. v. Peach Hill Properties*, 278 Ga. 198, 200(1), 599 S.E.2d 167 (2004) (property owner's challenge to agency policy was not the subject of any administrative decisional process). Best Tobacco may not circumvent the discretionary appeal requirement in this Court by filing an injunctive or declaratory action in the superior court. *Ferguson v. Composite State Bd. of Med. Examiners*, 275 Ga. at 257(1), 564 S.E.2d 715; *Nelson v. Fulton County*, 262 Ga.App. 382–383, 585 S.E.2d 710 (2003). The Revenue Commissioner's decisions to deny Best Tobacco's request for a refund and to seize cigarettes as contraband are decisions of a state administrative agency. Because the appeal's underlying subject matter falls within the discretionary appeal statute and because Best Tobacco failed to file an application, we are without jurisdiction to hear the merits of his appeal. *Ferguson v. Composite State Bd. of Med. Examiners*, 275 Ga. at 255, 564 S.E.2d 715; *Rebich v. Miles*, 264 Ga. at 469, 448 S.E.2d 192; *Schieffelin & Co. v. Strickland*, 253 Ga. at 387, 320 S.E.2d 358; *Plantation Pipe Line Co. v. Strickland*, 249 Ga. at 830, 294 S.E.2d 471. Accordingly, this appeal is hereby dismissed.

Appeal dismissed.

ANDREWS, P.J., and MILLER, J., concur.

269 Ga.App. 517

COHEN

v.

NUDELMAN.

No. A04A1444.

Court of Appeals of Georgia.

Sept. 9, 2004.

Certiorari Denied Jan. 10, 2005.

Background: Former husband moved to set aside paternity and child support determinations as to child, alleging that child was not his biological child. The Superior Court, DeKalb County, Becker, J., granted motion. Former wife applied for discretionary appeal.

Holdings: The Court of Appeals, Ruffin, P.J., held that:

(1) evidence established that former husband determined paternity after divorce proceedings;

(2) evidence established that former husband did not fail to exercise due diligence in investigating paternity issue;

(3) trial court improperly ordered former wife to reimburse $55,000 in child support payments; and

(4) vacation and remand of $25,000 to former husband for expenses of litigation was required.

Affirmed in part, reversed in part, vacated in part, and remanded.

1. Children Out-of-Wedlock ⚿62

To have a prior consent judgment regarding paternity and child support set aside through an extraordinary motion for new trial based on newly discovered evidence, the movant must show:(1) that the newly discovered evidence has come to his knowledge since the trial; (2) that want of due diligence was not the reason that the evidence was not acquired sooner; (3) that the evidence was so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness is attached to the motion or its absence accounted for; and (6) that the new evidence does not operate solely to impeach the credit of a witness.

2. Children Out-of-Wedlock ⚿62

Evidence established that former husband determined he was not father of child after divorce proceedings and execution of custody modification agreement, and thus, prior consent judgment regarding paternity and child support could be set aside through extraordinary new trial motion; although for-

mer husband questioned paternity during divorce proceedings, he offered verified pleading stating that he believed he was child's father until receiving DNA test results, and after former wife stated in her verified interrogatory responses that former husband was child's father, former husband entered modified settlement based on assumption that he actually was father.

3. Children Out-of-Wedlock ⚿62

Evidence established that former husband did not fail to exercise due diligence in investigating paternity issue, so as to set aside prior paternity determination through extraordinary motion for new trial; when former husband presented his suspicions of paternity to former wife, she swore that he was child's father, without indicating that another man possibly fathered child, and former wife admitted that, during time when child was conceived, she had sexual intercourse on one occasion with someone other than former husband, and she admitted that she had never told anybody before.

4. Children Out-of-Wedlock ⚿62

Due diligence requirement to have prior consent judgment regarding paternity and child support set aside through extraordinary motion for new trial based on newly discovered evidence related to diligence in discovering evidence of paternity, not due diligence in filing motion for new trial.

5. Children Out-of-Wedlock ⚿62

Former husband in paternity dispute adequately satisfied affidavit requirement relating to newly discovered evidence of paternity by verifying his motion for new trial based on newly discovered evidence, in which he asserted that DNA test revealed he was not child's father and further asserting that, until he received those results, he believed that he was father.

6. Children Out-of-Wedlock ⚿73

Statute establishing statutory procedure for setting aside a paternity determination based upon newly discovered evidence did not demand reversal of non-paternity determination on former husband's extraordinary motion for new trial, regardless of whether statute applied retroactively to former husband's motion, where trial court clearly applied new trial standard of *Roddenberry v. Roddenberry,* 255 Ga. 715, 342 S.E.2d 464, and nothing in statute prohibited trial court from employing standard other than that established by statute. West's Ga.Code Ann. § 19–7–54.

7. Children Out-of-Wedlock ⚿62

Order setting aside a paternity determination following the discovery of new evidence does not violate Georgia public policy.

8. Children Out-of-Wedlock ⚿67

Trial court improperly ordered former wife to reimburse former husband for over $55,000 in child support payments former husband made since divorce with regard to child, who was determined subsequent to divorce to not be former husband's child; statutory procedure specifically limited monetary relief available to issues of prospective child support payments and past due child support payments, and legislature could have permitted putative father who successfully set aside paternity determination to recoup past support payments, but did not. West's Ga.Code Ann. § 19–7–54(d).

9. Children Out-of-Wedlock ⚿73

Former wife's claim that public policy should prohibit ex-husband from suing ex-wife for fraud based on misrepresentations regarding paternity could not be considered on appeal from decision, on former's husband's extraordinary motion for new trial, setting aside paternity and child support determinations, where former wife raised argument for first time on appeal.

10. Children Out-of-Wedlock ⚿62
Constitutional Law ⚿299.3

Reimbursement award to former husband of $55,000 in child support payments former husband made since divorce with regard to child, who was determined subsequent to divorce to not be former husband's child violated former wife's due process rights; such award was not proper remedy in motion for extraordinary new trial based on newly discovered evidence, although former husband may have alleged separate fraud claim sounding in tort, former wife received

no notice that claim might be resolved and damages imposed following hearing, and thus, former wife had no reasonable opportunity to defend against claim or trial court's ultimate conclusion that she acquired funds by fraud. U.S.C.A. Const.Amend. 14.

11. Constitutional Law ⚿251.6

Due process demands that a litigant be given reasonable notice and opportunity to be heard, and to present its claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it. U.S.C.A. Const.Amend. 14.

12. Children Out-of-Wedlock ⚿73

Vacation and remand of $25,000 to former husband for expenses of litigation, based upon former wife's actions, including her actions relating to discovery issues and disputes which arose in paternity and child support action, was required, where trial court's order did not specify legal basis for award. West's Ga.Code Ann. § 9–11–37(a)(4)(A).

Simmons & Szczecko, M. T. Simmons, Jr., Joseph Szczecko, Decatur, Jean M. Kutner, Atlanta, for appellant.

Randall M. Kessler, Atlanta, for appellee.

RUFFIN, Presiding Judge.

Heidi Cohen and Richard Nudelman divorced in January 1992. According to the settlement agreement incorporated into the final divorce decree, the marriage produced two sons, J.N. and S.N., and Nudelman agreed to pay child support for both boys. In July 2001, however, Nudelman moved to set aside the paternity and child support determinations as to J.N. Alleging that J.N. is not his biological child, Nudelman sought relief from any future support obligations, as well as reimbursement for all previous support payments.

Following a hearing on August 15, 2003, the trial court granted Nudelman's motion. The court's order relieved Nudelman of all future support obligations relating to J.N., directed Cohen to reimburse Nudelman for $55,260 in past support payments, and awarded Nudelman $25,000 in litigation expenses. We granted Cohen's application for discretionary appeal, and for reasons that follow, we affirm in part, reverse in part, vacate in part, and remand for further proceedings.

1. Citing newly discovered evidence regarding J.N.'s paternity, Nudelman sought to set aside the prior paternity determination through an extraordinary motion for new trial. In resolving such motion, the trial court sits as the trier of fact, and its decision will be upheld absent a manifest abuse of discretion.[1] Furthermore, we must accept the trial court's factual findings if any evidence supports them.[2]

The record shows that, pursuant to the original divorce decree and settlement agreement, Cohen received primary physical custody of six-year-old J.N. and seven-year-old S.N. Nudelman agreed to pay child support for both boys, who, according to the settlement agreement, were "born as a result of [the] marriage."

On October 2, 1996, however, Nudelman's counsel wrote Cohen's attorney regarding a dispute over child support and medical expense payments. In the letter, counsel stated that Nudelman "ha[d] learned that he is not the biological father of [J.N.]." The following month, Nudelman petitioned the court to award him custody of both boys. In connection with that litigation, Nudelman served interrogatories on Cohen and asked: "Is Richard Nudelman the biological father of [J.N.]?" Cohen responded, "[y]es."

In July 1997, Cohen and Nudelman reached a settlement and entered a new agreement modifying their rights and obligations "with respect to the minor children of the parties." Under the new agreement, the parties retained joint legal custody of both children. But whereas Cohen continued to have physical custody over J.N., J.N.'s brother was placed in Nudelman's custody. Co-

1. See *City of Gainesville v. Waters,* 258 Ga.App. 555, 562(6), 574 S.E.2d 638 (2002); *Harrell v. State,* 70 Ga.App. 521–522, 28 S.E.2d 821 (1944).

2. See *Waters,* supra at 560(5), 574 S.E.2d 638.

hen and Nudelman each were responsible for making child support payments to the other.

In July 1999, Nudelman obtained DNA testing showing that he is not the biological father of J.N. Two years later, Nudelman filed his petition for extraordinary relief, citing the DNA report as evidence of nonpaternity. Through his verified pleading, Nudelman asserted that, until he received the DNA test results, he believed that he was J.N.'s father.

[1] Under our Supreme Court's decision in *Roddenberry v. Roddenberry,* a prior consent judgment regarding paternity and child support can be set aside through an extraordinary motion for new trial based on newly discovered evidence.[3] To obtain such relief, the movant must show:

> (1) that the newly discovered evidence has come to his knowledge since the trial; (2) that want of due diligence was not the reason that the evidence was not acquired sooner; (3) that the evidence was so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness is attached to the motion or its absence accounted for; and (6) that the new evidence does not operate solely to impeach the credit of a witness.[4]

Applying these factors, the trial court concluded that Nudelman was entitled to extraordinary relief and set aside all prior judgments regarding child support. Although Cohen challenges the trial court's findings as to each factor, sufficient evidence supports its ruling.

[2] (a) Cohen first argues that Nudelman failed to present any *newly discovered* evidence. In particular, she argues that Nudelman knew of the paternity issue before their divorce was finalized and thus cannot show that the evidence came to his knowledge since the "trial"—or entry of the final divorce decree. To support this claim, she cites affidavits in the record from two individuals who testified that Nudelman questioned J.N.'s paternity during the divorce proceedings. Cohen further argues that, even if Nudelman had no suspicion about J.N.'s paternity before the divorce, he certainly questioned the paternity in October 1996, when his attorney asserted that he was not J.N.'s father.

Despite this evidence, the trial court determined as a matter of fact that Nudelman discovered in June or July 1999 that he is not J.N.'s biological father. We find no error. Nudelman offered evidence through a verified pleading that he believed he was J.N.'s father until he received the test results from the June 1999 DNA test.[5] He also presented an affidavit from his former attorney who wrote the October 2, 1996 letter to Cohen's counsel. That attorney testified that he did not write the letter based on Nudelman's knowledge of paternity. Instead, the attorney "decided to question the paternity based on a statement made to ... Nudelman by a former friend of ... Cohen." And after Cohen stated in her verified interrogatory responses that Nudelman was J.N.'s father, Nudelman entered the modified settlement based on the assumption that he actually was the father.

Although the record contains conflicting evidence, the trial court, as factfinder, resolved these conflicts in Nudelman's favor and determined that Nudelman discovered the information about J.N.'s paternity in 1999, *after* the divorce proceedings and execution of the 1997 modification agreement.

3. 255 Ga. 715, 717, 342 S.E.2d 464 (1986). See also *Dept. of Human Resources v. Browning,* 210 Ga.App. 546, 547(1)(a), 436 S.E.2d 742 (1993) (noting that in *Roddenberry,* "the Supreme Court recognized an extraordinary motion for new trial (based on newly discovered evidence) as a proper procedural vehicle for challenging a consent judgment which resolved issues of paternity and child support").

4. (Punctuation omitted.) *Roddenberry,* supra.

5. See *BEA Systems v. WebMethods, Inc.,* 265 Ga.App. 503, 504, 595 S.E.2d 87 (2004) (noting that a verified complaint serves as both pleading and evidence); *Weekes v. Nationwide Gen. Ins. Co.,* 232 Ga.App. 144, 149(3)(b), 500 S.E.2d 620 (1998) (" 'Verified pleadings have been held to be equivalent to a supporting or opposing affidavit for purposes of raising an issue of fact on summary judgment.' ").

Because this finding is supported by some evidence, we will not disturb it.[6]

[3] (b) Next, Cohen argues that Nudelman failed to exercise diligence in investigating the paternity issue. She again points to his alleged knowledge both before the divorce proceeding and in 1996. The trial court, however, found that he had no knowledge until 1999. And the record shows that when Nudelman presented his suspicions to Cohen in 1996, she swore that he was, in fact, J.N.'s father. Finally, at the hearing on Nudelman's extraordinary motion, Cohen admitted that, during the time when J.N. was conceived, she had sexual intercourse on one occasion with someone other than Nudelman. According to Cohen, she had "never admitted to this before and [had] never told anybody." She further agreed that this individual possibly fathered J.N.

We find no error in the trial court's determination that Nudelman exercised due diligence in discovering the evidence. Presented with a question about J.N.'s paternity in 1996, Nudelman asked Cohen whether he was the father, and she replied "yes," without indicating that another man possibly fathered the boy. Although he arguably could have obtained a DNA test at that point, the trial court did not abuse its discretion in refusing to view his failure to do so as a lack of diligence.

[4] Finally, we cannot agree with Cohen's vague assertion that Nudelman failed to exercise diligence by waiting two years after the DNA test to file his extraordinary motion, during which time he continued to pay child support pursuant to the modified settlement agreement. *Roddenberry's* due diligence criteria relates to diligence in discovering the evidence—not diligence in filing a motion for new trial. And we can hardly find a lack of diligence in Nudelman's decision to comply with the court-ordered support payments.

(c) According to Cohen, the trial court erred in concluding that the paternity evidence was material, would have produced a different outcome in the divorce proceedings, and was not cumulative. We disagree. Evidence establishing that J.N. is not Nudelman's son certainly would have altered the final divorce decree, which obligated Nudelman to pay significant sums in child support. And we find no merit in Cohen's assertion that the paternity evidence was "merely cumulative evidence supporting what [Nudelman] already knew."

[5] (d) Cohen claims that Nudelman failed to attach to his extraordinary motion an affidavit regarding the newly discovered evidence or to otherwise account for the affidavit's absence. As noted by the trial court, however, Nudelman verified his motion, in which he asserted that the June 1999 DNA test revealed he is not J.N.'s father. Nudelman further asserted that, until he received those results, he believed that he was the father. We find no error in the trial court's conclusion that Nudelman adequately satisfied the affidavit requirement.[7]

(e) Finally, Cohen claims that the newly discovered evidence serves no purpose other than to impeach her credibility. Again, we disagree. The new evidence shows that Nudelman is not J.N.'s father.[8] Although such evidence certainly impeaches Cohen's claim that he is the father, that is not its sole purpose.

6. See *Waters,* supra. We find no merit in Cohen's claim that the statement in the October 2, 1996 letter demands judgment in her favor. We similarly reject Cohen's claim that "[t]he theories of res judicata and collateral estoppel vitiate [Nudelman's] claim of newly discovered evidence after" execution of the modified settlement agreement in 1997. See *Browning,* supra ("[T]he doctrines of res judicata and estoppel by judgment are inapposite when ... a consent judgment is under attack via extraordinary motion for new trial [based on newly discovered evidence].").

7. See *Weekes,* supra.

8. The 1999 DNA test report obtained by Nudelman has potential chain-of-custody and resulting admissibility problems. Apparently concerned about this issue, the trial court ordered that new DNA tests be conducted and the results submitted to the court under seal for consideration in the court's final determination. We have been unable to find these test results in the record, and neither party has provided a helpful record cite. Cohen, however, does not dispute that the tests were conducted and submitted to the trial court, or that the results support Nudelman's claim of non-paternity.

[6] 2. At several points in her brief, Cohen argues that Nudelman's motion failed to meet the requirements of OCGA § 19–7–54. That provision, which became effective after Nudelman filed his motion, but before the trial court ruled, establishes a statutory procedure for setting aside a paternity determination based upon newly discovered evidence.[9]

At the hearing on Nudelman's motion, the parties discussed whether OCGA § 19–7–54 applies retroactively to this case and, if so, whether Nudelman had met the statutory requirements. The trial court's ruling, however, is clearly based upon the criteria set forth in *Roddenberry.* And nothing in OCGA § 19–7–54 prohibits the trial court from issuing a decision using the *Roddenberry* standard, rather than the statutory mechanism.[10] Accordingly, we find no merit in Cohen's claim that OCGA § 19–7–54 demands reversal.

[7] 3. Cohen also argues that allowing Nudelman to "delegitimize" J.N. violates public policy. The Supreme Court, however, has sanctioned a method for challenging paternity based on newly discovered evidence, and the trial court found that Nudelman met the necessary requirements for raising such challenge. Furthermore, as noted above, the legislature recently established a statutory procedure for challenging a prior paternity determination. Although the trial court based its ruling on *Roddenberry,* the legislature's action further shows that an order setting aside a paternity determination following the discovery of new evidence does not violate Georgia public policy.

[8] 4. The trial court, therefore, did not err in setting aside the prior judgments relating to paternity and child support. Nevertheless, we agree with Cohen that the trial court improperly ordered her to reimburse Nudelman for over $55,000 in child support payments he has made since the divorce. Nothing in *Roddenberry* supports such an award, and the new statutory procedure specifically limits the monetary relief available to "the issues of prospective child support payments [and] past due child support payments."[11] The legislature could have permitted a putative father who successfully sets aside a paternity determination to recoup past support payments, but it did not do so. And we have found no case law that otherwise authorizes such recovery through an extraordinary motion for new trial based on newly discovered evidence.

[9, 10] Assuming, for the sake of argument, that past child support payments can be recovered as damages in a fraud action,[12] the trial court erred to the extent it awarded such damages at this point.[13] Nudelman filed an extraordinary motion for new trial to set aside a child support determination. In his pleading, he also sought "relief" based on Cohen's alleged fraud and arguably stated a tort claim for fraud. Cohen, however, clearly believed that the trial court was only addressing the motion for new trial at the August 15, 2003 hearing. In fact, Cohen's counsel specifically stated that the hearing involved "a motion," rather than a trial. Neither the trial court nor Nudelman's counsel disputed this statement, and nothing in the record indicates that the trial court set August 15, 2003, as a trial date for resolving a

9. See OCGA § 19–7–54.

10. See OCGA § 19–7–54(c) (providing that if the movant cannot meet the statutory requirements for setting aside the paternity determination, "the court may grant the motion or enter an order as to paternity, duty to support, custody, and visitation privileges *as otherwise provided by law*") (emphasis supplied).

11. See OCGA § 19–7–54(d).

12. See *Butler v. Turner,* 274 Ga. 566, 569–570(2), 555 S.E.2d 427 (2001) (mother may bring fraud action against father of child who fraudulently misrepresented income to reduce child support obligations); *Ghrist v. Fricks,* 219 Ga.App. 415, 422(4), 465 S.E.2d 501 (1995) (evidence supported fraud verdict in action brought by former husband against his ex-wife on grounds that ex-wife fraudulently led him to believe that he was father of child born during marriage).

13. On appeal, Cohen argues that public policy should prohibit an ex-husband from suing an ex-wife for fraud based on misrepresentations regarding paternity. Cohen, however, has not shown that she raised this argument below, and we will not address such argument for the first time on appeal. See *Clark v. Chick–Fil–A,* 214 Ga.App. 758, 759(1), 449 S.E.2d 313 (1994).

tort claim. Nonetheless, the trial court essentially treated the hearing as a bench trial for the fraud allegations and awarded damages, finding that Cohen had "acquired [past child support payments] by fraud."

[11] Due process demands that a litigant be given "reasonable notice and opportunity to be heard, and to present its claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it." [14] We cannot find that the trial court's award of previously paid child support satisfies due process. As noted above, such award is not a proper remedy in a motion for extraordinary new trial based on newly discovered evidence. Furthermore, although Nudelman may have alleged a separate fraud claim sounding in tort, Cohen received no notice that this claim might be resolved and damages imposed following the hearing. Thus, she had no reasonable opportunity to defend against the claim or the trial court's ultimate conclusion that she acquired funds by fraud. Accordingly, we must reverse the trial court's order to the extent it finds Cohen liable in tort for fraud, vacate the award of $55,260 in past child support payments, and remand the case for further proceedings on any properly raised fraud allegations.[15]

[12] 5. Finally, Cohen argues that the trial court erred in awarding Nudelman $25,000 in "expenses of litigation, based upon [her] actions, including her actions relating to the discovery issues and disputes which arose in this case." Although the trial court's order does not specify a legal basis for the award, Nudelman claims on appeal that the trial court properly awarded him litigation expenses pursuant to OCGA § 9–11–37(a)(4)(A), which provides:

> If [a motion to compel] is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

This provision, however, only permits recovery of expenses incurred in obtaining an order compelling discovery. And, given the language used by the trial court, it does not appear that the $25,000 award relates solely to such expenses. Furthermore, Nudelman has not pointed us to any evidence in the record showing that he spent $25,000 to obtain an order compelling discovery.

Under these circumstances, we are uncertain whether the trial court's litigation expense award is based on OCGA § 9–11–37(a)(4)(A), some other provision, or a combination of provisions. We are unable, therefore, to properly review the award. Accordingly, we must vacate the $25,000 award and remand for further clarification by the trial court.[16]

Judgment affirmed in part, reversed in part, vacated in part and case remanded.

ELDRIDGE and ADAMS, JJ., concur.

14. (Punctuation omitted.) *In the Interest of B.A.S.,* 254 Ga.App. 430, 442(9), 563 S.E.2d 141 (2002).

15. See *Maples v. Seeliger,* 165 Ga.App. 201, 202(1), 299 S.E.2d 906 (1983) (setting aside contempt finding because trial court failed to give alleged contemnor reasonable notice and an opportunity to be heard); see also *Coweta County v. Simmons,* 269 Ga. 694, 507 S.E.2d 440 (1998) ("There having been no notice to [the defendant] that the [court] might consider the merits of the issue of his alleged negligence, a holding that he was liable, tantamount to an award of summary judgment against him, would deny him due process.").

16. See *Cotting v. Cotting,* 261 Ga.App. 370, 371–372(2), 582 S.E.2d 527 (2003); *Easler v. Fuller,* 169 Ga.App. 110, 111, 311 S.E.2d 534 (1983).