In the Supreme Court of Virginia

RECORD NO. 181238

Court of Appeals Record No. 1838-17-1

JAMES DAVID EVERETT, II

Appellant,

v.

KATHRYN JEAN TAWES

Appellee.

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellee Kathryn Tawes ("Tawes") ignores precedent cited by Appellant David Everett ("Everett") for the proposition that the trial court enjoys the discretion to modify retroactively a *pendente lite* award. She cites authority the Court of Appeals distinguished on this issue and a decision that Court, *in banc*, vacated. Tawes resorts to assertions that Everett "appealed" to a different trial judge for a better result, wanted "two bites at the apple," and needs to know how "Virginia courts work."

The crux of Tawes' case, however, is that by making no ruling on whether it has the power to modify retroactively a *pendente lite* award, the trial court did not abuse its discretion when not modifying that same award the court declared an "injustice." For the first time Tawes acknowledges that the trial court enjoys the discretion to modify retroactively a *pendente lite* award. Inaction in not righting an "injustice" is no less an abuse of discretion than is corrective action.

REPLY TO TAWES' STATEMENT OF MATERIAL FACTS

Relying less on the law and more on fact, Tawes selectively presents parts of the record. Attempting to downplay the burden of the *pendente lite* award on Everett, Tawes asserts that Everett's support obligation "was unclear from the record because part of Everett's support obligation required him the pay various

marital expenses directly [to the creditor or vendor] . . . ." *Brief of Appellee* at 2. The *Pendente Lite Order* is clear:

> [Everett] shall be solely responsible for paying the mortgage and all the monthly utilities and expenses associated with the marital residence including all past due and present HOA fees. . . . [Everett] shall be required to pay the monthly payments and monthly auto insurance payments [on Tawes' Nissan Armada].

JA at 8-9 (*Pendente Lite Order* ¶¶ 1, 3). Her own evidence betrays her: writing in her *Income and Expense Statement* that some of the above expenses are based on her "average of 12 months," Tawes details expenses the court ordered Everett to pay that Tawes claims are "unclear":

Category of Expense	Monthly Average
Mortgage	3,696.00
Automobile payment	701.59
Automobile insurance	79.49
Electricity	377.06
Gas/Heating Oil	82.91
Water/Sewer	238.74
Trash Collection	29.83
Internet/Cable/Land Line	199.45
Home security	53.18
Yard service and yard treatments	266.08
Dodson exterminator	20.00
Homeowner's Association	144.33
Total:	$5,888.66

JA at 568 (*Income and Expense Statement* marked as Plaintiff's Exhibit 6). These amounts are *in addition to* the trial court's ordering Everett to pay $7,831 in cash support, the sum of all of which, over $13,720/month, clearly exceeds by

$2,000/month Tawes' stated need of $11,720/month. *See* JA at 568. Tawes explained that she "looked at two years" of bills for the electrical, water, sewer, telephone charges, internet, cable and trash collection to derive these amounts. *See* JA at 147.

Tawes attempts to lighten Everett's burden by declaring that Everett's payment of "marital debt . . . benefited both parties." *Brief of Appellee* at 6. If Everett enjoyed the "benefit" of paying these obligations for a residence and a vehicle for which Tawes had exclusive possession, he would acknowledge that benefit. (Having no bearing on his ability to pay support, his payment of the mortgage at least increased equity.)

Tawes counters that she also had financial obligations not reported in her *Income and Expense Statement*—credit card debt and a loan from her mother. *Brief of Appellee* at 5. Her *Income and Expense Statement* alleges $58,000 in credit card debt, but the *Statement* shows no payments. Tawes testified that at the request of <u>*her*</u> counsel, she removed those expenses, and she added that some of the credit card charges were for her itemized monthly expenses in any event. *See* JA at 150 (ll. 1-8, 20-24). (Presumably Tawes wanted to avoid an assertion that she was double-counting her expenses by adding credit card payments for her charges of the same expenses.) Moreover, the *Income and Expense Statement*

shows no loan repayments to her mother—much less any loan under her "Other Debts." *See id.* at 568.

Tawes' other amplification of "material facts" actually includes no new fact; instead, Tawes asserts, as fact, the trial court's conjecture that Everett "can divert some of the money he's getting." *Id.* at 207 (l. 25) – 08 (l. 1). Tawes fails to disclose the court's completion of that thought in the next statement: "The money that he's getting he says is reported income but he has to pay it out for taxes, so that seems to me something that is going to be adjustable. I don't know." *See id.* at 208 (ll. 1-4). This speculation about what is "adjustable," contradicted by testimony that Everett pays taxes based not on what he actually receives but on a greater amount, his share of company income, comes from the same judge who remarked that he needed an "expert opinion" to explain Everett's income. *See id.* at 210 (ll. 6-7). In any event, Everett returned with an expert, who did no more than explain what Everett had explained about how his share of business income is taxed.

REPLY TO TAWES' ARGUMENT

I. THE COURT OF APPEALS, IN EFFECT, TREATED THE *PENDENTE LITE ORDER* AS FINAL AND UNAPPEALABLE.

<u>*Standard of Review*</u>: The parties concur that the trial court's power to modify retroactively *pendente lite* spousal support is a question of law decided *de novo*. *See Brief of Appellee at 7* (Tawes "incorporates Everett's standard of

review"). The parties disagree about two fundamental points: (1) whether the Court of Appeals declared that the *pendente lite* award was a final judgment, and (2) whether the trial court's power to modify *pendente lite* spousal support includes retroactive modification preceding the filing of a motion for reconsideration. As discussed later, on the second point—retroactive modification—Tawes retreats from her position.

Argument: Although the Court of Appeals did not expressly state that amounts accruing under a *pendente lite* support order are a final judgment, its ruling treats those amounts, in effect, as final and unappealable because, according to the Court of Appeals, each amounts vests as it comes due and may not be modified retroactively. *See* JA at 98. The effect of not re-examining a *pendente lite* award was the immediate accrual of almost $47,000 in arrearages between the date of filing and the date of the *pendente lite* hearing and the subsequent accrual of $19,000 in additional arrearages.

In Part I of her *Brief*, Tawes goes to great lengths to challenge any payor's ability to seek retroactive modification of *pendente lite* spousal support. Tawes ignores the Court of Appeals' controlling precedent declaring that the trial court enjoys the discretion to modify retroactively a *pendente lite* spousal support award. *See MacDougall v. Levick*, 66 Va. App. 50, 84-88, 782 S.E.2d 282, 199-201 (2016), *rev'd on other grounds*, 294 Va. 283, 805 S.E.2d 775 (2017); *Kleinfield v.*

Verucki, 7 Va. App. 183, 190, 372 S.E.2d 407, 411 (1988) (discussed in *Opening Brief* at 20-22). She cites case authority the Court of Appeals already has distinguished on the exact issue at hand, *see Brief of Appellee* at 10 (citing *Reid v. Reid*, 245 Va. 409, 429 S.E.2d 208 (1993), *distinguished by MacDougall v. Levick*, 66 Va. App. 50, 84, 88 n. 18, 782 S.E.2d 282 (2016), *rev'd on other grounds*, 294 Va. 283, 805 S.E.2d 775 (2017)), and that Everett addressed in his *Opening Brief*. *See Opening Brief* at 18-20. Tawes even cites authority the Court of Appeals has vacated. *See Brief of Appellee at* 11 (citing *Weidlein v. Weidlein*, 65 Va. App. 260, 777 S.E.2d 222, *vacated en banc*, 65 Va. App. 247, 779 S.E.2d 247 (2015)).

Tawes' more glaring misstep, however, is application of two statutes, Virginia Code sections 20-109 and 20-112, which relate to the modification of final decrees—not *pendente lite* orders. *See id.* at 8. Eventually Tawes betrays all of her arguments by declaring that the trial court did not abuse it discretion by not retroactively modifying the award. *See id.* at 12.

Everett acknowledges that Virginia Code sections 20-109 and 20-112 address the modification of a decree of support (section 20-109) and the trial court's discretion to modify retroactively a support award when "proceedings are re-opened" (section 20-112). Neither statute, however, refers to Virginia Code section 20-103, which provides the trial court the authority to make orders that are necessary during a pending case—not after entry of the final decree.

The Court of Appeals has spoken unequivocally about the proper application of section 20-109: "The plain language of section 20-109(A), 'the court may increase, decrease, or terminate the amount of support,' *presupposes* the existence of a *final award* which is subject to later modification of the additional criteria of Code section 20-109 are met." *Wright v. Wright,* 38 Va. App. 394, 405, 564 S.E.2d 702 (1991) (emphasis added). Section 20-109 "has been applied *only to modification of a final award*." *Id.* at 404, 564 S.E.2d at 707 (citations omitted) (emphasis added). Section 20-109 is the last of "three steps" in determining a party's support obligation—preceded by sections 20-103 and 20-107.1. *See id.* at 404, 564 S.E.2d at 707.

Entirely consistent with the Court of Appeals' declaration that section 20-109 pertains to final awards is section 20-107.1, the statute addressing the court's authority to award support pursuant to a final decree. *See* Va. Code § 20-107.1. Final decrees of spousal support "are subject to the provisions of section 20-109." *Id.* § 20-107.1(B). By contrast, Virginia Code section 20-103, the operative statute for *pendente lite* relief, contains no such limitation, and on its face, section 20-112 has no bearing because it specifically relates to re-opened cases—not to a pending action. Neither the Code nor the common law declares that a *pendente lite* award is subject to the same limitation as final decrees.

Tawes engages in dismissive word play to rebut Everett's appeal. She argues that Everett, "want[ing] another bite at the apple," "appeal[ed]" to one judge to reverse another, and she declares, "This is not how Virginia courts work." *Brief of Appellee* at 11. Tawes knows that Everett's design was not to pit one jurist against another. Anticipating that the first presiding judge also would address the *Show Cause Motion* and *Motion for Reconsideration* at the same time, Everett's counsel requested the clerk of court to send a copy of his *Motion* to the first presiding judge. *See* JA at 221 (ll. 16-19). Everett's counsel even expressed "concern" to the second judge at the outset of the second hearing that although that judge "will certainly apply the facts [to] the law, [he] may tend to defer to the ruling of the [first] presiding judge . . . ." *Id.* at 222 (ll. 13-15). Responding to the court's remark that he "would respect a pre-trial order with another judge or a pre-trial ruling," *id.* at 223 (ll. 14-16), Everett's counsel replied, "I understand. And that is my exact point." *Id.* (ll. 18-19). The bottom line is that Everett was not gaming the process. To the contrary, he was concerned that the second judge, out of deference to a peer, would not correct the first judge.

Most significantly, despite all the above machinations to deny Everett retroactive relief, *Tawes ultimately concedes that the trial court does enjoy the discretion to modify retroactively a pendente lite spousal support order*: "The trial court simply chose not to retroactively modify temporary support under the broad

discretion invested in it under Virginia Code section 20-103." *See Brief of Appellee* at 12. She adds, "[T]he trial court did not abuse its discretion by refusing to retroactively modify the arrearage . . . ." *Id.* at 17-18.

Nonetheless, the trial court's indecisiveness about its authority—or "ground I don't want to cover," JA at 529B (ll. 2-3)—is not an exercise of discretion in the first place. Inaction is abdication of discretion—especially when the court already has declared that the *pendente lite* award was an injustice. The Court of Appeals erred by treating the *pendente lite* award as a judgment not subject to challenge.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT MODIFYING RETROACTIVELY THE *PENDENTE LITE ORDER* AND BY ENTERING JUDGMENT ON THE ARREARAGE.

Standard of Review: The parties agree that the trial court's refusal to modify *pendente lite* spousal support retroactively rested in the trial court's discretion. *Brief of Appellee* at 14-18. An abuse of discretion occurs when the trial court erroneously believes that it lacks the authority to act and does not act. *See Lawlor v. Commonwealth,* 285 Va. 187, 213, 738 S.E.2d 847, 861 (2013).

Argument: Tawes acknowledges that the trial court "never ruled at any hearing on whether he could change [support] or not." *Brief of Appellee* at 17. To her credit, she acknowledges at least part of the second trial judge's declaration: "I don't think, as I told you, legally that an arrearage *pendente lite* makes any sense at

all." *Id.* at 16 (quoting JA at 374 (ll. 19-21)). Tawes omits, however, what the court had "told" the litigants in that same ruling: "I am really concerned that the number in the arrears that was created in the case is an injustice." JA at 374 (ll. 6-7). Remarking that Tawes had "wasted three hours" trying to find Everett in contempt, the court asked about its authority to modify the *Pendente Lite Order* because the court believed "a great injustice has likely occurred . . . ." *Id.* at 366 (ll. 9-10). Despite evidence at the show cause hearing and at trial that Everett lacked the ability to pay almost $14,000/month, the court abused its discretion by taking no corrective action.

The upshot of the trial court's inaction is the following:

- from May, 2016, until the hearing in October, 2016, as Everett was paying almost $6,000/month, without any court order, for Tawes' benefit (e.g., mortgage, utilities, car, insurance), he unknowingly was accruing each month judgments of $7,831 from which he could not immediately appeal or even post a suspension bond, and those arrearages stand;

- as he continued to pay what he could afford to pay from November, 2016, to March, 2017—when the trial court dismissed the show cause proceeding as a waste of time—judgments of $7,831/month continued to accrue against Everett, and those arrearages stand; and

- despite the trial court's declaration that the arrearage "makes no sense" and is an "injustice," and despite the trial court's ruling that permanent support ($4,800/month) should be approximately 36% of the *pendente lite* support awarded, the court entered judgment against Everett for over $66,437.68, plus interest at 6% until paid

> in full, and the Court of Appeals has allowed that judgment to stand. *See* JA at 55 (Final Decree ¶ C (Spousal Support)).

And the result of the Court of Appeals' ruling that the trial court did not err is a judgment grounded in an injustice. This Court should not condone the trial court's finding repeatedly that the *pendente lite* award was unjust and then "chickening out," in the trial court's words, by taking no action to cure that injustice, nor should this Court permit a judgment to stand on that injustice.

CONCLUSION

Tawes has abandoned her position that a trial court, as a matter of law, cannot modify retroactively a *pendente lite* award preceding the filing of a motion to reconsider. Everett renews his request for this Court to reverse the Court of Appeals and to remand the case to the trial court, with instructions to (1) vacate the judgment for the arrearage and (2) to determine what *pendente lite* support, if any, should have been ordered during the pendency of the case. Everett also requests the Court to award him his attorney's fees and costs incurred incident to this appeal.

JAMES DAVID EVERETT, II

By: Robert L. Harris, Jr. /s/

CERTIFICATE

The undersigned hereby certifies as follows:

1. The name and address of Appellant are

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5. The undersigned counsel has complied with Rule 5:26. The word count is 2,612 words.

6. A copy of this *Reply Brief* has been emailed to counsel for the Appellee this 17th day of May, 2019.

7. The Appellant desires to state orally to this Court the reasons why Court should award him the requested relief.

Robert L. Harris, Jr. /s/
Counsel