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.

OPENING BRIEF OF APPELLANT

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Appellant James David Everett, II ("Everett"), by counsel, requests this Court (1) to reverse the ruling of the Court of Appeals denying Everett's appeal of a *pendente lite* spousal support order and (2) to remand the case to the trial court, with instructions to address what spousal support arrearage, if any, Everett owes Appellee Kathryn Jean Tawes ("Tawes").

STATEMENT OF THE CASE, INCLUDING MATERIAL PROCEEDINGS AND FACTS

Material Proceedings

Pendente Lite Hearing

In March, 2016, the parties separated, and the next month Tawes sought *pendente lite* spousal support incident to her filing a *Complaint* for divorce. *See* Joint Appendix ("JA") at 1-4. She also filed a *Motion for Spousal Support,* which *Motion* included a request for "entry of an order awarding her temporary and permanent spousal support pursuant to the 9th Circuit Guidelines." *See id.* at 5.

A chef by profession, Everett is a member of several limited liability companies that own restaurants in the Williamsburg area. For purposes of taxation, he reports his share of ordinary income allocated to him, but in some years he has not received a cash distribution even to pay his personal tax liability on the pass-through income allocated to him. Based on a formula employed by the Ninth Judicial Circuit that considers gross income—regardless of money actually

received—the trial court awarded Tawes *pendente lite* support of almost $14,000/month in cash ($7,831/month), *as well as* continuing payments by Everett of various expenses (e.g., mortgage, car loan, car insurance, utilities) for Tawes' benefit). *See id.* at 8-9. Retroactive to the date of her filing of the *Complaint,* the award led to an immediate support arrearage of almost $46,986, *see id.* at 9, despite Everett's monthly payments, before the *pendente lite* hearing, of the mortgage secured by the home where Tawes resided, the loan on her car, her car insurance, and various household expenses for Tawes' benefit. Everett objected that he "does not receive the income used by the Court to derive the presumptive amount of spousal support." *See id.* at 10.

Show Cause Hearing

Stemming from Everett's failure to stay current, the trial court issued a *Rule to Show Cause.* Everett filed a *Motion for Reconsideration of Pendente Lite Spousal Support. See id.* at 11-20. Tawes responded with a *Motion for Increase of Pendente Lite Spousal Support. See id.* at 21-33. On March 28, 2017, the trial court heard evidence regarding the *Rule to Show Cause.* Overruling Tawes' objection to Everett's showing his actual cash income in the form of distributions and a guaranteed salary, the court remarked, "If he doesn't have the ability to pay what he has been ordered to pay I can't hold him in contempt. . . . *[I]t is appropriate to go into what his true income is . . . .*" *Id.* at 270 (ll. 10-13) (emphasis added). Later

adding that Tawes had "wasted three hours," *id.* at 366 (ll. 4-5), and remarking that "a great injustice has likely occurred," *id.* (ll. 9-10), the court remarked that it wants to know "what [Everett] is truly getting as opposed to what the income lines [on the tax returns] are." *Id.* at 456 (ll. 17-18). (The Court of Appeals observed that the trial court "was attentive to [Everett's] actual cash flow because his tax exposure distorted his true financial position." *Id. (Memorandum Opinion)* at 102.)

Not only did the court not find Everett in contempt despite a cash arrearage that had grown to almost $67,000, but the court also declared, "I am really concerned that the number in the arrears that was created in this case is an injustice." *Id.* at 374 (ll. 5-7). The court remarked,

> I do find it offensive to come in and imply that somebody's income is $600,000 and he's living in an outbuilding and there is absolutely no evidence of a lavish lifestyle or anything else and to come in and to point to certain areas in the tax return and say see, you know, there is a lot more money here than meets the eye when there is no, absolutely no external evidence of that being true.

Id. at 373 (ll. 5-12). Having heard (i) what Everett actually was receiving in earnings (as opposed to his gross income) and (ii) what he had paid for Tawes' benefit (mortgage, car loan, utilities and some cash), the court remarked, "I don't think . . . legally that an arrearage *pendente lite* makes any sense at all." *Id.* at 374 (ll. 19-21).

Nonetheless, the Court questioned its authority to modify retroactively a *pendente lite* award: "I am really concerned about exactly what the effect of the *pendente lite* order is." *Id.* at 367 (ll. 20-21). The court ordered the parties to file

memoranda addressing the court's authority to modify retroactively a *pendente lite* spousal support order and requested the parties to schedule a *new* hearing on Tawes' *Motion to Increase Support* and Everett's *Motion for Reconsideration. See id.* at 40-41 (*Order* entered on April 26, 2017).

Hearing on Motion to Increase Support and Motion for Reconsideration

The parties appeared before the trial court on June 6, 2017, on the remaining *Motions*. The court, however, did not hear any additional evidence but, instead, conceded that it was "chickening out" of rendering a decision, *see id.* at 400 (ll. 9-11), and, referring to unnamed judges on the Court of Appeals, added that those judges "may . . . recognize [the issue] has due process problems if they don't allow appeals of pendente lite orders." *Id.* at 390 (ll. 21-24). The trial court remarked that the court *may* adjust the equitable distribution award at trial "to counteract [the spousal support] arrearage that has been created." *Id.* at 397 (ll. 19-21) (emphasis added). The court declared that if it thought the arrearage is "improper," the court can "take it into account in [equitable distribution]." *Id.* at 391 (ll. 12-13). (As discussed below, the trial court made no such adjustment to the equitable distribution award.)

Asked the support arrearage as of that day, Tawes' counsel conceded that he had not "done the math" because, Tawes "probably [is] going to have a modification

of the previous order based on the Court's position the last time we were here." *Id.* at 392 (ll. 6-9). Absorbing the trial court's comments about the injustice of the award, Tawes never requested ongoing accrual of any arrearage and, therefore, did not object when the court entered an order establishing the arrearage as of March, 2017.

Concerned that modification of a *pendente lite* award would be reversible error, the court declared that it "is disinclined to rule on each motion but . . . reserves the right to adjust the award of equitable distribution if, at trial, [the court] finds that the Order of *Pendente Lite* Support has been improper." *Id.* at 51-52 (Order entered on July 25, 2017). Both parties objected to any linkage between equitable distribution and *pendente lite* spousal support. *See id.* at 52,

Trial on Equitable Distribution and Spousal Support

The trial on equitable distribution and spousal support spanned four days. At the close of the evidence on the third day—before any ruling on equitable distribution and support—the court declared that it would not vacate the *Pendente Lite Order:* "Whether or not I have the authority to vacate that is just ground I don't want to cover." *Id.* at 529A (ll. 22-25) – 529B (ll. 1-3). On the fourth day of trial, in response to a remark by Tawes' counsel that he failed to address the "spousal support arrearage issue," the court interjected, "I am not going to do anything with it." *Id.* at 532 (ll. 17-21). The court divided the marital estate equally, *id.* at 536 (ll.

20-25), which division led to a monetary award to Tawes. *See id.* at 67 (*Final Decree* (Ex. B)). The court awarded Tawes $4,800 in monthly spousal support.

Remarking that the award is "far less than the *pendente lite* order," *id.* at 541 (ll. 8-9), the court declared that the *Pendente Lite Order* "put Everett in a position where he flat out almost didn't have the ability to pay and allow himself anything to live on." *Id.* (ll. 9-11). The court added that applying Everett's taxable income "gave an . . . inaccurate picture of his ability to pay. But that arrearage stays in this case." *Id.* at 541 (ll. 14-16). The court "decline[d] to modify retroactively the *Pendente Lite* Order entered on December 12, 2016, and, therefore, declare[d] that an arrearage in the amount of $66,437.68 in spousal support exists as of the date of the entry of the *Final Decree.*" Id. at 55 (*Final Decree* at 3 (Spousal Support)).

Appeals

Everett appealed to the Court of Appeals, and that Court affirmed the trial court. *Id.* at 96-102. Everett filed a *Petition for Rehearing*, *id.* at 103-20, and the Court denied that request. *Id.* at 120. Everett timely noted his appeal to this Court, and this Court granted Everett's appeal on March 5, 2019. Tawes now concedes that "temporary support orders are modifiable retroactively," *see Brief in Opposition [to Petition for Appeal]* at 6, and rests her defense on the trial court's "broad discretion" to "retroactively modify temporary support." *Id.* at 9. Tawes declares that the trial court "did adjust the pendente lite arrearage because it did not

consider any additional arrearages after March 27, 2017," *id.* at 12, when, in point of fact, Tawes' counsel conceded that Tawes was not seeking further accrual in light of the court's remarks at the previous hearing. *See id.* at 392 (ll. 6-9).

Material Facts

Everett is a member of four limited liability companies, each of which owns a restaurant in Williamsburg, Virginia, and Tawes and he are members of a limited liability company that owns a bed and breakfast inn, which also is in Williamsburg. *Id.* at 127 (ll. 10-25) – 29 (ll. 1-20). Everett's income includes guaranteed payments of $5,000/half month from one restaurant, *id*. at 242 (ll. 16-19), and membership distributions from his membership interests "to cover the tax liability from the restaurants." *Id.* at 242 (ll. 20-25) – 43 (ll.1). The money he actually receives is the sum of the guaranteed payments "and whatever distribution that's supposed to go to tax." *Id.* at 257 (ll. 6-9)). "When those distributions can be made, the distribution first goes to tax, and any money that's left over from that can be used for whatever means." *Id.* at 243 (ll. 6-8).[1]

Everett presented at the *pendente lite* hearing two Ninth Circuit Guideline Worksheets—one reflecting his guaranteed earnings (money actually received of $10,000/month) and the other reflecting his three-year average of <u>gross</u> <u>income</u> of

[1] In point of fact, in 2014, before the parties separated, Tawes and Everett had used $150,000 in distributions Everett received that year to place a downpayment on their purchase of a bed and breakfast inn and not to pay taxes. JA at 164 (ll. 7-23).

$32,922/month based on taxable income—not merely the income actually received in the forms of guaranteed payments and distributions. *Id.* at 548 (three-year average gross), 549-50 (Ninth Circuit Worksheets). *(The Ninth Circuit Pendente Lite Guidelines require disclosure of "Average Gross Pay per Month").* Everett explained that his gross income is composed of his guaranteed payment and his share of each restaurant's income but that he does not receive the gross income: "I'm attributed income whether I receive the income or not . . . ." *Id.* at 192 (ll. 5-6). Significantly, as of the date of the *pendente lite* hearing, after his receipt of member distributions <u>and</u> payment of 2015 and 2016 taxes, Everett had approximately $2,200 remaining from those distributions. *Id.* at 105 (ll. 1-6); 551-56 (copies of cancelled checks payable to United States Treasury and Virginia Department of Taxation for 2015 and 2016).

The trial court relied on Everett's report of "monthly gross income" required by the Ninth Circuit *Pendente Lite* Guidelines and not on cash actually available to meet living expenses: "His income is over $400,000 a year. That's what he reports for taxes. That's what he pays taxes on." *Id.* at 210 (ll. 9-11). The court declared, "The money that he's getting he says is reported as income but he has to pay it out for taxes, so that is something to me that is going to be adjustable. I don't know." *Id.* at 208 (ll. 1-4).

The court ordered Everett to pay cash of $7,831/month, "the mortgage and all monthly utilities and expenses associated with the marital residence including all past due and present HOA fees," as well as a car loan and car insurance. *Id.* at 8-9 (*Pendente Lite Order* ¶¶ 1-3). *According to Tawes' own estimate of her costs declared in her Income and Expense Statement*, those payments for her benefit (e.g., mortgage, car loan and insurance, utilities) totaled almost $5,900/month; the mortgage ($3,696), car loan ($701.59) and insurance payments ($79.49) alone totaled almost $4,500/month, with other court-ordered household expenses totaling an additional $1,400/month. *See id.* at 568 (Tawes' *Income and Expense Statement*). According to Tawes, her monthly expenses, excluding attorney's fees, were $11,720/month. *See id.*

The total support award—almost $14,000/month—was nearly 140% of Everett's monthly guaranteed payments of $10,000 before taxes on that income. The *pendente lite* award placed Everett immediately in arrears $46,986 for the retroactive support commencing six months earlier. *See id.* (*Pendente Lite Order* ¶ 2). In response to Everett's objection that he does not have the funds to pay Tawes, the court remarked that it needs an "expert opinion" to explain Everett's income. *Id.* at 209 (ll. 22-25) – 10 (ll. 1-7). Everett further objected to the award because "Everett does not receive the income used by the Court to derive the presumptive amount of support. *Id.* at 10.

As of March 28, 2017, the date of the hearing on the *Rule to Show Cause*, Everett was in arrears an additional $19,451.68, *id.* at 226 (ll. 7-25)–27 (ll. 1-19), for a total of over $66,000. In his defense Everett repeated much of his testimony from the *Pendente Lite* hearing, and when pressed to acknowledge that his gross income in 2016 was $618,000, *id.* at 252 (ll. 16-24), Everett declared that he received $270,000 of that reported income. *Id.* at 339 (ll. 2-5). Everett then showed how every payment he had received since the *pendente lite* hearing had been applied to court-ordered obligations—leaving him nothing on which to subsist. *Id.* at 590-93. Everett noted that he borrowed approximately $11,500 to satisfy a marital debt, thereby lowering his monthly expenses. *See id.* at 302 (ll. 6-24). He also borrowed $4,000 from his sister so that he could purchase Christmas gifts for his children. *Id.* at 303 (ll. 3-7). After the *pendente lite* hearing in October, 2016, he opened four credit cards and accrued debt of approximately $34,000 in additional credit card debt in approximately five months. *Id.* at 304 (ll. 6-9).

Based on the court's remark at the first hearing that the court wanted an "expert opinion," at the *Show Cause* hearing Everett provided that evidence through the testimony of the businesses' certified public account, David Damiani.[2] Damiani

[2] The Honorable Walter Ford had presided at the hearing on Tawes' *Motion for Pendente Lite Relief*. The Honorable Charles Maxfield presided at the hearing on the *Rule to Show Cause* and all subsequent hearings. At the beginning of the hearing on the *Rule to Show Cause*, the purpose of which also was to address Everett's *Motion for Reconsideration*, Judge Maxfield remarked, "Well, I will let

testified that the income of each of the restaurants is not taxed to the businesses but, instead, "passes through and the owners by agreement are taxed on the net income of the entities." *Id.* at 327 (ll. 15-19). The businesses themselves do not pay the income tax. *Id.* (ll. 9-19). Damiani remarked that the money received by members as distributions may not equal the actual income reported because managers make distributions "if it is the best fiduciary interest of the partnership." *Id.* at 335 (ll. 10-12). He added, "There are circumstances where partnerships have positive business income and *do not make a distribution for that year*." *Id.* (ll. 12-14) (emphasis added).

Specific to the restaurants, Damiani explained that in 2016, although Everett reported over $270,000 in ordinary income from DoG Street Gastropub, *id.* at 329 (ll. 7-10), he received only $150,000 in distributions. *Id.* at 331 (ll. 6-12), 587 (K-1 for 2016). Damiani also explained that Everett had taxable income from another restaurant, Blue Talon Bistro, of approximately $313,000 in 2016 (sum of guaranteed payments and LLC income allocated to him less deductions), *id.* at 418 (ll. 24-25) – 419 (ll. 1-20), but he received only the guaranteed payment and <u>no</u> distribution—not even to pay his tax liability. *Id.* at 588 (Schedule K-1 for 2016). And in the case of another restaurant, The Trellis, Damiani explained that although

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you in on another hint. I am not predisposed to modifying the *pendente lite* Order." JA at 224 (ll. 1-3).

Everett had allocated income of $24,000, he had received no distribution—not even to pay taxes on the allocation: "He would have to derive the cash to pay his taxes from other sources because he is taxed on that $24,000 regardless of whether he received any distribution or guaranteed payment." *Id.* at 334 (ll. 17-20). Most significantly, when asked about the impact of applying a party's gross income for income tax purposes and not the party's actual cash, including distributions and guaranteed payments when determining spousal support, Damiani declared, "*It could potentially have significantly negative effects. If he's not able to receive a distribution equal to the taxable income that he is required to report, then he can be in a position where he is unable to meet his tax obligations as well as his support obligations*." *Id.* at 336 (ll. 1-14) (emphasis added).

At the close of the evidence at the multi-day trial, the court remarked, "[Everett] has a serious cash-flow problem because of the way he is taxed." *Id.* at 538 (ll. 6-7). The court declared that the *Pendente Lite Order* "put Mr. Everett in a position where he flat out almost didn't have the ability to pay and allow himself anything to live on." *Id.* at 541 (ll. 9-12). Nonetheless, true to its remark at the close of third day of trial, *see supra,* pp. 4-5, the court did not modify retroactively the *Pendente Lite Order*. *Id.* (ll. 6-7).

ASSIGNMENTS OF ERROR

I. THE COURT OF APPEALS ERRED BY DECLARING THAT A *PENDENTE LITE* SPOUSAL SUPPORT ORDER IS A FINAL JUDGMENT, EFFECTIVELY DENYING EVERETT A RIGHT OF APPEAL. (JA at 103 (*Petition for Rehearing*))

II. THE TRIAL COURT ERRED WHEN IT FAILED TO MODIFY RETROACTIVELY THE *PENDENTE LITE* SPOUSAL SUPPORT AWARD, DECLARED THAT AN ARREARAGE EXISTS, AND ENTERED JUDGMENT ON THE ARREARAGE AFTER DECLARING THAT THE SPOUSAL SUPPORT AWARD IS AN INJUSTICE.
(JA at 11-20 (*Motion for Reconsideration of Pendente Lite Order*), 34-39 (*Memorandum Supporting Motion for Reconsideration*), 43-52 (*Reply Memorandum Supporting Retroactive Modification*), 51 (Objection to *Order* declining request for retroactive modification), 58 (Objection to *Final Decree* declining request for retroactive modification))

ARGUMENT

I. THE COURT OF APPEALS ERRED BY DECLARING THAT A *PENDENTE LITE* SPOUSAL SUPPORT ORDER IS A FINAL JUDGMENT, EFFECTIVELY DENYING EVERETT A RIGHT OF APPEAL (Assignment of Error I).

Standard of Review: Whether the trial court has the power to modify retroactively a *pendente lite* spousal support order is a question of law reviewed *de novo*. *See Hackett v. Commonwealth,* 293 Va. 392, 399, 799 S.E.2d 501, 505 (2017) (addressing *de novo* trial court's authority to modify final conviction order); *Harrell v. Harrell,* 272 Va. 652, 656, 636 S.E.2d 391, 393 (2006) (addressing *de novo* trial court's jurisdiction to award reservation of support absent valid pleading).

Analysis: Declaring that once any spousal support obligation becomes due—even pursuant to a *pendente lite* order—it may not be modified retroactively, the Court of Appeals (1) misstated controlling precedent, (2) relied on distinguishable authority, and (3) cited an inapplicable statute. An examination of each legal declaration in the *Memorandum Opinion* should lead the Supreme Court to reverse the Court of Appeals and to remand the case to the trial court, with instructions to vacate that part of the *Final Decree* declaring an arrearage. The four numbered sections below quote the declarations in the *Memorandum Opinion*.

1. "The law is settled that support payments vest as they accrue and may not be modified retroactively. *See Cofer v. Cofer*, 205 Va. 834, 839, 140 S.E.2d 663, 666 (1965); *Smith v. Smith*, 4 Va. App. 148, 152, 354 S.E.2d 816, 818 (1987)." JA at 98.

In *Cofer v. Cofer*, 205 Va. 834, 140 S.E.2d 663 (1965), the operative orders were an unappealed final decree of divorce awarding spousal and child support, a subsequent final order terminating spousal support by agreement but increasing the prior award of spousal support, which order also was not appealed, and an order entered three years later that relieved the payor of his obligation to pay a child support arrearage from the modification order he had not appealed. A *pendente lite* order was not at issue in *Cofer*. The Supreme Court held that payments "*exacted by the original decree of divorce* become vested as they accrue and the

court is without authority to make any change as to past due installments." *Id.* at 838, 140 S.E.2d at 666 (emphasis added).

By contrast, this appeal arises from a *pendente lite* spousal support order that was not immediately appealable, that Everett attempted to address during the pendency of the lower court proceeding, and that he timely appealed at the first opportunity, incident to entry of the final decree. *Cofer* does not stand for the proposition that *pendente lite* spousal support orders are incapable of review for error, the conclusion reached by this Court.

The facts in *Smith v. Smith*, 4 Va. App. 148, 152, 354 S.E.2d 816, 818 (1987), also cited by the Court of Appeals, bear no resemblance to Everett's circumstances. In that case, the payor paid *pendente lite* support until his retirement, when he stopped paying support without seeking an order terminating support. Without notice to either party, the trial court dismissed the case several years later due to inactivity. When the payor spouse filed a new divorce proceeding three years after dismissal of the first proceeding, he attempted to avoid the *pendente lite* support obligations that had accrued *before* dismissal of the first case. The payor spouse (i) never had challenged the *pendente lite* award during the pendency of the first case, (ii) had not filed a motion seeking to amend or terminate support, and (iii) had not appealed the temporary order at the conclusion of the case. Citing *Cofer*, which Everett has distinguished above, and noting that the taking away of support

payments that had accrued, without notice to the payee, would deny the payee due process, this Court declared that the payor owed the support payments that accrued until dismissal of the action. *See id.,* 4 Va. App. at 152, 354 S.E.2d at 818-19.

By contrast, Everett steadfastly has challenged the *Pendente Lite Order*—both at trial below and as soon as he could appeal that order. Unlike the payor in *Smith,* Everett did not even know that an arrearage necessarily was accruing. The decision to award spousal support retroactively, as well as the amount of support, was in the trial court's discretion. *See Lawrence v. Lawrence,* 212 Va. 44, 47, 181 S.E.2d 640, 642 (1971).[3] And unlike the payor in *Smith,* Everett tried to right a wrong before his appeal and promptly after entry of the *Final Decree*.

Everett was statutorily prohibited from appealing immediately a ruling that abruptly saddled him with six (6) months of arrearages (more arrearages accrued). *Without any notice to Everett through any former adjudication, arrearages were accruing* even as Everett paid household and automobile expenses for Tawes' benefit. The trial court later declared that the award was an "injustice" but did nothing to cure the injustice. "To hold that the legislature intended to arbitrarily deny the right of appeal to one party in a civil litigation [sh]ould raise serious due

[3] Two scenarios cannot be reconciled if the current ruling stands: on one hand, a payor may appeal an award of support, effective as of the filing date, granted in a final decree, but, on the other hand, if Everett is denied relief, a payor ordered to pay *pendente lite* support retroactive to the filing date has no similar recourse despite the non-appealability immediately of the same relief *pendente lite.*

process and equal protection issues . . . ." *Prestera v. Denny*, 1 Va. App. 103, 105, 336 S.E.2d 169, 169 (1985). For this Court to deny Everett any relief is to deny him due process.

While relying on distinguishable decisions, the Court of Appeals ignored well-settled law that *pendente lite* orders may be modified and even rescinded:

> An interlocutory judgment or decree made in the progress of a cause is always under the control of the court until the final decision of the suit and it may be modified *or rescinded* upon sufficient grounds shown, at any time before final judgment though it may be after the term in which the interlocutory decree was given.

Freezer v. Miller, 163 Va. 180, 197 n.2, 176 S.E. 159, 165 (1934) (emphasis added). Citing *Freezer,* the Court of Appeals declared, in a case addressing *pendente lite* spousal support, "The matter of *pendente lite* support remains within the control of the court and *the court can change its mind* while the matter is still pending before it." *Pinkard v. Pinkard,* 12 Va. App. 848, 853, 407 S.E.2d 339, 342 (1991) (emphasis added) (declaring that *pendente lite* support order was not immediately appealable, that denial of motion to reconsider was discretionary, and that an aggrieved party may appeal a *pendente lite* award "after entry of a final decree").

The non-appealability of a *pendente lite* spousal support order, *see id.* at 851, 407 S.E.2d at 341, flows from the fact that the order is not a final judgment and does not adjudicate the principles of the cause. By statute the order shall have no presumptive effect. *See* Va. Code § 20-103. If the *pendente lite* support obligation

were a final judgment, then a *pendente lite* spousal support order would be appealable as a final judgment. Neither the General Assembly nor this Court ever contemplated that a litigant in Everett's position should have no recourse to challenge an "injustice"—as so described by the trial court.

2. "In *Reid v. Reid,* 245 Va. 409, 415, 429 S.E.2d 208, 211 (1993), the Court held that even though the wife was not entitled to spousal ``support because she had deserted her husband, there was no statutory provision or implied authority to allow him restitution for support that he already had paid her." JA at 98.

The Court of Appeals correctly summarized the above holding in *Reid v. Reid, supra,* but that case is distinguishable in two critical respects: (i) the payor spouse in *Reid* was seeking repayment—not the setting aside of an arrearage; and (2) the spousal support award in *Reid* arose from a <u>final decree</u>—not from a *pendente lite* order that could not have been appealed immediately.

As discussed more thoroughly below (number 3) and as emphasized previously on brief, the Court of Appeals has expressly distinguished *Reid* from that circumstance in which a payor seeks restitution arising from overpayments made pursuant to a *pendente lite* order. *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) (trial court has discretion to modify retroactively *pendente lite* spousal support). Simply put, the ruling in *Reid* does not apply to this case.

The decision in *Reid*, however, does reveal an important distinction between a *pendente lite* spousal support award and an award pursuant to final decree. At least in the latter instance a spouse seeking to suspend spousal support payments pending the appeal has the right to request suspension of a support order. *See* Va. Code § 8.01-676.1(D). No such relief is available to the payor pursuant to a *pendente lite* award. He has no right of immediate appeal, cannot post a suspension bond, and has no choice but to pay the amounts as they come due or risk contempt. This distinction underscores the propriety of ensuring a litigant in Everett's position that he has a forum to seek relief from what the trial court described as an "injustice."

No less significantly, the Court in *Reid* distinguished actions for restitution generally from repayment specifically in divorce proceedings, the latter actions being "concerned with the needs of dependent spouses or what may be deemed expedient concerning the 'maintenance and support of spouses'" and addressing "a public as well as a marital duty—a moral as well as a legal obligation." 245 Va. at 413, 429 S.E.2d at 209. The Court's natural reservation against requiring a spouse in necessitous circumstances to repay some or all amounts erroneously paid is not present in a case addressing only an unpaid cash arrearage—especially so in this

case, in which Everett continued to pay Tawes' mortgage, car loan, car insurance, and household utilities.

In this case, the arrearage strictly is cash amounts—not the mortgage payments, utilities, internet/cable/land line, yard service, automobile loan, association fees, exterminator service, and automobile insurance—all of which Everett continued to pay. A discretionary decision that Everett should not be liable for amounts that he has not paid when he already was paying Tawes almost all of his income is a far cry from a court's ordering Tawes to repay an amount already paid to her and that she already may have spent.

3. "Similarly, in *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), and *Kleinfield v. Verucki,* 7 Va. App. 183, 190, 372 S.E.2d 407, 411 (1988), this Court held that even though those marriages were found to be void, restitution could not be awarded for paid *pendente lite support."* JA at 98-99.

The decisions in *MacDougall v. Levick* and *Kleinfield v. Verucki*, *supra,* do ***not*** stand for the proposition that "restitution *c[annot]* be awarded for paid pendente lite support." *Id.* at 99 (emphasis added). To the contrary, each ruling declares that retroactive modification of a *pendente lite* spousal support order—in the form of restitution of paid support—depends not on whether the court has the

authority in the first place but, instead, on whether the trial court *properly has exercised it discretion* pursuant to the authority it does have.

In *Kleinfield* the payor spouse asserted that the trial court "erroneously failed to provide restitution for *pendente lite* spousal support paid prior to judgment" of a void marriage. *Kleinfield,* 7 Va. App. at 184, 372 S.E.2d at 408. The Court of Appeals framed the issue not as whether the trial court *could* award restitution but, instead, as whether the trial judge "abused his discretion" (the court quoted this standard three times) in not awarding restitution. *Id.* at 190, 372 S.E.2d at 411. Not ruling that the trial court lacked authority to award restitution, the Court declared, "Under the facts and circumstances of the case, we cannot find that the trial judge abused his discretion . . . ." *Id.* at 190, 372 S.E.2d at 411. If the Court had held in *Kleinfield* that "restitution could not be awarded," JA at 99—it did not—it would not have then examined the "facts and circumstances" and considered repeatedly whether the trial judge "abused his discretion"—which it did examine.

Likewise, in *MacDougall* the Court of Appeals again did not hold that "restitution could be awarded for paid *pendente lite* support." *Id.* In point of fact, the Court ***rejected*** the payee's threshold assertion that a trial court "cannot order any litigant to repay any spousal support." *MacDougall,* 66 Va. App. at 88, 782 S.E.2d at 200 n.18. The court rejected that argument by distinguishing *Reid v. Reid,* 245 Va. 409, 429 S.E.2d 208 (1993), in which the Court held that the trial court lacks

authority to order restitution of support awarded incident to a final decree: *"Reid* did not address a situation, like this one, involving a trial court's authority to order repayment of *pendente lite* support during ongoing trial litigation." *MacDougall*, 66 Va. App. at 88, 782 S.E.2d at 200 n.18.

Next the Court in *MacDougall* summarized the beneficial relationship enjoyed by the payor through the payee's "entertaining and networking," working for the payor without pay, lending his company money at a critical juncture, and "contribut[ing] her financial resources for the family well-being." *Id.*, 782 S.E.2d at 201. Based "[o]n these facts," this Court "detect[ed] no abuse of discretion" by the trial court in not ordering restitution. *Id.,* 782 S.E.2d at 201. "The facts and circumstances support the trial court's *exercise of discretion* in declining to order [the payee] to repay the *pendente lite* support." *Id.* at 87, 782 S.E.2d at 200 (emphasis added).

4. "Only if the payee spouse remarries and fails to notify the payor spouse is restitution of support authorized for amounts paid after the remarriage. *See* Code § 20-110." JA at 99.

The Court of Appeals recited a circumstance in which the General Assembly has declared that an overpayment of spousal support will lead to an order of restitution, a remarried ex-spouse's failure to notify the payor ex-spouse of that remarriage. That circumstance would occur only after support has been paid

pursuant to a final decree. That circumstance is not before the Court. Everett is appealing *pendente lite* relief that immediately created an arrearage but that was not then immediately appealable. More fundamentally, his appeal relates to an arrearage for funds not yet paid—not the return of funds arising from any alleged overpayment. In short, the General Assembly's stating when a payee/ex-spouse must repay overpayments should have no bearing on whether Everett, who is not seeking restitution from a remarried former spouse, can seek relief against a judgment for arrearages he has not paid.

A closer examination of the statutory framework for final support orders reveals those limited circumstances when amounts that are unpaid become judgments. In all orders directing the payment of spousal support *when the parties also have a duty to support minor children* and in all orders directing the payment of only child support (these parties have no minor children), the trial court shall declare in the order that an unpaid obligation "creates a judgment by operation of law." *See id.* § 20-60.3. Most significantly, in every *final* order for support arising from a divorce, that order shall declare that "the support obligation as it becomes due and unpaid creates a judgment by operation of law." *Id.* § 20-107.1(H)(6). (That finality, however, is circumscribed by another provision declaring that the court has the discretion to modify retroactively a final spousal support order. *See id*. § 20-112.)

Conspicuously missing from the statute authorizing this Court to enter temporary orders, Virginia Code section 20-103, is any declaration that a *pendente lite* spousal support award becomes a final judgment. If the General Assembly had contemplated that *pendente lite* spousal support orders shall create final judgments, not subject to modification, the General Assembly could have so declared in section 20-103, as the General Assembly has done in other instances.

That the General Assembly did *not* declare that *pendente lite* spousal support orders are judgments necessarily means that the General Assembly did *not* contemplate that this kind of order is final and non-modifiable. "[W]hen the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code, we must presume that the difference in the choice of language was intentional." *Zinone v. Lee's Crossing Homeowners Ass'n.,* 282 Va. 330, 337, 714 S.E.2d 922, 925 (2011).

If the General Assembly had wanted that outcome—that is, that a *pendente lite* spousal support order is a final judgment—it could have legislated that result. As discussed more thoroughly below, this distinction coalesces with the statutory limitation of appeals only of final orders of support. *See* Va. Code § 17.1-405(3)(d).

II. THE TRIAL COURT ERRED WHEN IT FAILED TO MODIFY RETROACTIVELY THE *PENDENTE LITE* SPOUSAL SUPPORT AWARD, DECLARED THAT AN ARREARAGE EXISTS, AND ENTERED JUDGMENT ON THE ARREARAGE AFTER DECLARING THAT THE SPOUSAL SUPPORT AWARD IS AN INJUSTICE. (Assignment of Error II).

Standard of Review: The trial court enjoys "the *discretion* [to] make any order that may be *proper* to compel a spouse to pay any sums necessary for the maintenance and support of the petitioning spouse . . . ." Va. Code § 20-103(A) (emphases added). The purpose of a *pendente lite* spousal support order is "to preserve the status quo until the ultimate entry of a decree of divorce . . . ." *MacDougall v. Levick*, 66 Va. App. 50, 86, 782 S.E.2d 282, 199 (2016), *rev'd on other grounds*, *Levick v. MacDougall*, 294 Va. 283, 805 S.E.2d 775 (2017).

The trial court abuses its discretion "when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is considered and given significant weight, and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment." *Lawlor v. Commonwealth*, 285 Va. 187, 212-13, 738 S.E.2d 847, 861 (2013) (citation omitted). "The abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." *Porter v. Commonwealth*, 276 Va. 203, 261, 661 S.E.2d 415, 445 (2008), *cert. denied,* 556 U.S. 1189, (2009). A court abuses its discretion if it inaccurately ascertains its outermost limits, including when the trial court believes

that it lacks authority that it actually possesses. *Lawlor,* 285 Va. at 213, 738 S.E.2d at 861. In this instance the record is clear that the trial court was uncertain of its authority and, instead of taking any action, erroneously took no action.

Analysis: Everett acknowledges the trial court's discretion to preserve the status quo through *pendente lite* orders, and he understands that discretion necessarily gives the court latitude to operate within the bounds of reason. This *pendente lite* award, however, strayed far outside those bounds. Based on the evidence adduced at three evidentiary hearings—the *pendente lite* support hearing, the hearing on the *Rule to Show Cause*, and a multi-day trial—the court had compelling reasons not to apply "gross income" inflexibly under the Ninth Judicial Circuit's guidelines. Not only did the result yield an award that exceeded by approximately $2,000/month Tawes' purported need but it also ascribed to Everett income he does not actually receive.

Basing its ruling on Everett's gross income for tax purposes and ignoring the undisputed evidence that the reported income is not his actual income—even disregarding the testimony that Everett uses his distributions to pay taxes on that pass-through income—the court initially declared that it needed expert witness testimony to explain Everett's income and ordered him to pay almost $14,000/month to Tawes or for her benefit. In response to Tawes' effort to hold him in contempt, Everett returned to court and testified that he had been using almost 100% of his

income to pay support while he lived in an outbuilding, and he also testified that a family member had eased the burden by paying a car loan, that he had borrowed $4,000 from that family member, and that he had accrued over $30,000 in new credit card debt.

To that second hearing Everett also brought that "expert opinion" desired by the court to explain Everett's income; the expert, a certified public accountant whose firm does the businesses' taxes, explained what Everett himself had explained five months earlier: the pass-through income reported in tax filings is not a reflection of actual income. The accountant further explained that in Everett's case, Everett had tax liability stemming from pass-through income of two businesses that were not even making cash distributions to him to satisfy his tax liability. The court was "offen[ded]" that Tawes would try to have the court find Everett in contempt and declared that the *pendente lite* award was an "injustice."

The clear impediment to the court's taking corrective action was its express concern that it lacked the authority to modify the *Pendente Lite Order*. Despite Everett's offering (i) statutory authority distinguishing those orders that are <u>final</u> and (ii) common law declarations that the trial court has discretion to order repayment of *pendente lite* support, the trial court erroneously declined to modify the *Pendente Lite Order*.

The trial court's mistaken understanding of its actual authority to modify retroactively a *pendente lite* spousal support award exposes the unjustifiable reason for the court's inertia as it failed to right a wrong—to correct the "injustice" created by that *Order*. Noting at the hearing on the *Motion for Reconsideration* that it was "chickening out" and that it may make an adjustment of the equitable distribution award, the court deferred the issue to trial, but at trial it declared that it was making no adjustment and the next day divided the marital estate equally, with no adjustment to account for the *pendente lite* award that it had declared an injustice. Erroneously "believ[ing] that it lacks authority that it actually possesses," *Lawlor,* 285 Va. at 213, 738 S.E.2d at 861, yielding its unwillingness to cure that injustice, the trial court's inaction was an abuse of discretion.

CONCLUSION, INCLUDING RELIEF SOUGHT

This Court should reverse the Court of Appeals and declare that the trial court not only has the authority to modify retroactively a *pendente lite* spousal support order to cure an acknowledged injustice but also that the trial court abused its discretion by not modifying that order retroactively. Everett respectfully requests this Court to reverse the Court of Appeals' holding that the *Pendente Lite Order* created a final judgment 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 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.

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CERTIFICATE

The undersigned hereby certifies as follows:

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5. A copy of this Opening Brief of Appellant Appeal has been mailed to counsel for the Appellee this 11th day of April, 2019.

6. The Appellant desires to state orally to a panel of this Court the reasons why the petition for appeal should be granted in person.

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