DIVISION II

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, Judge

CA06-509

FEBRUARY 21, 2007

NENA LEE

APPELLANT

V.

VICTOR YOUNG

APPELLEE

APPEAL FROM THE HEMPSTEAD COUNTY CIRCUIT COURT
[NO. E91-299-1]

HON. DUNCAN CULPEPPER, JUDGE

AFFIRMED

Appellant Nena Lee appeals the December 21, 2005, order of the Hempstead County Circuit Court, which found that res judicata prevented the trial court from ordering payment of back child support from appellee Victor Young to appellant. Appellant contends on appeal that the trial court erred in applying res judicata and in denying her motion for judgment on the pleadings. Upon de novo review we affirm but do not rely upon res judicata.

I. Facts

The parties were divorced by decree filed February 11, 1992. The property-settlement agreement awarded custody of the parties' two children to appellant, who was to receive $70.00 per week in child support. On October 11, 1993, an agreed order modifying the

decree was filed that decreased child support to $2000 for the time period August 9, 1993, to August 9, 1994. The order further provided in paragraph five as follows:

> At such time as the Plaintiff [appellee] ceases to be a full-time student, and no later than August 9, 1994, the Plaintiff is to report to the Court his income, and his child support shall be set commensurate with said income and the Family Support Chart in use by this Court at that time, and said support will become due and payable beginning the first week after August 9, 1994.

On August 19, 1997, an agreed order modifying the decree and property settlement agreement was filed that suspended child support between August 13, 1997, and June 30, 1998. On November 2, 1998, an agreed order modifying the decree and property settlement agreement was filed that suspended child support between October 19, 1998, and June 30, 1999.

On January 29, 2003, appellant filed her petition for modification of the divorce decree asking that the current child support be modified. Her attorney withdrew on September 16, 2003. On February 12, 2004, the trial court denied appellant's requested relief of modification, finding that there had been no change of circumstances.

On June 18, 2004, appellant obtained another attorney and filed a motion for citation to collect child support that had not been paid between August 10, 1994, to August 12, 1997; July 1, 1998, to October 28, 1998; and July 1, 1999, to the present. On February 28, 2005, appellee filed his amended response to the motion for citation and raised the defense of res judicata. Appellant filed a motion to strike the amended response and motion for judgment on the pleadings on March 14, 2005. The trial court held a hearing on November 17, 2005, and ruled on the issue of res judicata and the motion for judgment on the pleadings. The

December 21, 2005, order, which resulted from the November 17, 2005, hearing, stated that the appellee was to pay $70 per week in child support and $300 in attorney's fees to appellant. Further, the trial court ordered that appellant's request for back child support was denied based upon res judicata, and the motion for judgment on the pleadings was denied. This appeal followed.

II. Applicable law

The standard of review for questions of law is de novo. *Sowders v. St. Joseph's Mercy Health Ctr.*, ___ Ark.___, ___ S.W.3d___ (Jan. 18, 2007). The award of child support is also reviewed under the de novo standard. *Hill v. Kelly*, ___ Ark. ___, ___ S.W.3d ___, (Nov. 30, 2006). A trial court's conclusions on a question of law are given no deference on appeal. *Murphy v. City of West Memphis*, 352 Ark. 315, 101 S.W.3d 221 (2003). However, in the absence of a showing that the trial court erred, its interpretation of the statute should be accepted as correct on appeal. *Middleton v. Lockhart*, 344 Ark. 572, 43 S.W.3d 113 (2001).

Where a case is based on the same events as the subject matter of a previous lawsuit, res judicata will apply even if the subsequent lawsuit raises new legal issues and seeks additional remedies. *Office of Child Support Enforcem't v. King*, 81 Ark. App. 190, 100 S.W.3d 95(2003) (citing *Office of Child Support Enfcm't v. Williams*, 338 Ark. 347, 995 S.W.2d 338 (1999)). Res judicata bars relitigation of a subsequent suit when five factors are present: (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based upon proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action; (5) both suits involve the same parties or their

privies. *Id.*, (citing *Moon v. Marquez*, 338 Ark. 636, 999 S.W.2d 678 (1999)). Res judicata bars not only the relitigation of claims that were actually litigated in the first suit but also those that could have been litigated. *Id*. The policy of the doctrine is to prevent a party's relitigating a matter on which it has already been given a fair trial. *Id*.

III. Whether res judicata applies

Appellant argues that under *King*, *supra*, once child support debts fall due, they become vested and constitute a judgment subject to garnishment or execution. Appellant argues that appellee's child support obligations were due and not paid for the time periods of August 10, 1994, to August 12, 1997; July 1, 1998, to October 28, 1998; and July 1, 1999, to present. She contends that appellee did not move to modify his obligation, and that the agreed orders that were entered modified the obligation for only specified periods of time. Appellant argues that a judgment, which is what appellee's child support obligations became after they were due, can be collected at any time, independent of what other related actions are brought by the obligee, thus making res judicata inapplicable.

Appellee argues that the order of February 10, 2004, does address child support. Appellee claims that the underlying motion was appellant's petition for modification of the decree. In paragraph six of that pleading, appellant claims a material change in circumstances since the entry of the divorce decree and the agreed orders modifying it. The trial court ruled in the February 10, 2004, order: "That no change of circumstances has been shown by Defendant [appellant]. That no child support is ordered to be paid by either party

since there was not a change in circumstances that would warrant a change in this Court's previous orders."

We agree and take the argument a step further for clarification. As stated earlier, the agreed order of October 11, 1993, contains the following language in paragraph five:

> At such time as the Plaintiff [appellee] ceases to be a full-time student, and no later than August 9, 1994, the Plaintiff is to report to the Court his income, and his child support shall be set commensurate with said income and the Family Support Chart in use by this Court at that time, and said support will become due and payable beginning the first week after August 9, 1994.

However, the trial court did not set appellee's child support as pronounced in the above order. That portion of the order was never enforced. Instead, an order was filed August 19, 1997, which reflected the parties' agreement that through June 30, 1998, they would share joint custody, with appellee as the primary custodian, and no child support was owed or paid by either party. Finally, the order of November 2, 1998, reflects the parties' agreement from the August 19, 1997, order and extended it until June 30, 1999.

As stated above, the order of February 10, 2004, reflects that the trial court found no change of circumstances when appellant moved for modification. The trial court ordered no child support at that time, and because none had been set in accordance with the agreed order of October 11, 1993, none was due. Appellant then moved for contempt against appellee based on nonpayment of child support for certain time periods between August 1993 and the present, which were not encompassed by the agreed-modification orders. However, no child-support order was in effect after the expiration of the first agreed order because the agreement that appellee would report his income to the court and have the support set by the

Family Support Chart was not enforced. Appellee need not have argued res judicata as a defense because child support was not established after the order of October 11, 1993.

Because res judicata does not apply, we need not address appellant's arguments regarding the timeliness of appellee's res judicata argument, modified res judicata, whether appellant's motion for modification is distinct from her contempt motion, or whether the application of res judicata improperly modifies the child support at issue.

IV. Judgment on the pleadings

Appellant contends that an amended pleading takes the place of the original pleading. *Edward J. DeBartolo Corp. v. Cartwright*, 323 Ark. 573, 916 S.W.2d 114 (1996). She argues that in the instant case, appellee filed an amended pleading that took the place of his original response. The amended pleading did not contain any denials of the allegations made by appellant. Therefore, appellant argues that appellee waived any denials and admitted them as a matter of law. She claims that because appellee failed to deny the claims in the amended pleading, the trial court erred in denying her judgment on the pleadings.

Appellee contends that appellant's argument is flawed because *DeBartolo*, *supra*, is distinguishable from the instant case. In *DeBartolo*, the pleading at issue was the complainant's original complaint and amended complaint. Here, the pleading at issue is a response and amended response. Appellee claims that under *Farm Bureau Mutual Insurance Co. v. Campbell*, 315 Ark. 136, 865 S.W.2d 643 (1993), the supreme court held that the rules of civil procedure do not contain a requirement that would compel any party to reallege his

defenses. Therefore, we affirm the trial court's decision denying appellant's motion for judgment on the pleadings.

Further, we affirm the trial court's determination that appellee does not owe back child support to appellant. However, we decline to base our opinion on res judicata; rather we base it on our interpretation of the trial court's orders.

Affirmed.

BIRD and BAKER, JJ., agree.