

SHAMELL MARY LAVIGNE

NO. 20-C-468

VERSUS

FIFTH CIRCUIT

TYRELL MATTHEW BRAUD

COURT OF APPEAL

STATE OF LOUISIANA

January 19, 2021

Susan Buchholz

First Deputy Clerk

IN RE SHAMELL MARY LAVIGNE

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT, PARISH OF ST JAMES, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE ALVIN TURNER, JR., DIVISION "E", NUMBER 38,901

Panel composed of Judges Susan M. Chehardy,
Hans J. Liljeberg, and John J. Molaison, Jr.

WRIT GRANTED; STAY ORDER LIFTED

In this writ application, relator, Shamell Lavigne, seeks review of the trial court's November 2, 2020 judgment, granting the Motion for New Trial filed by respondent, Tyrell Braud, for purposes of allowing additional testimony in this child support proceeding, and denying her Exception of No Cause of Action, Exception of Res Judicata, and Opposition to Motion for New Trial. For the following reasons, we grant relator's writ application and reverse the trial court's ruling granting a new trial in this matter.

On September 8, 2020, the trial court held a hearing via Zoom on Ms. Lavigne's Rule to Establish Child Support. At this hearing, Mr. Braud's child support obligation was set at \$2,255.34, based on his annual gross income for 2019. On September 24, 2020, the trial court signed an Income Assignment Order, ordering Mr. Braud's employer to withhold the child support obligation from Mr.

Braud's income and to forward this amount to Ms. Lavigne via "the appropriate State Disbursement Unit."

On September 17, 2020, Mr. Braud filed a Motion for Reduction of Child Support, requesting that his child support obligation be recalculated using his "actual income" instead of his 2019 gross income. Just as he argued at the September 8, 2020 hearing, Mr. Braud asserts in his motion that he worked additional hours and earned additional pay in 2019 during his "turnaround," but he will not be able to earn this additional money this year since a turnaround is only allowed once every five years of employment. He states that he intends to have a representative of his employer at the hearing of this matter to answer questions and present evidence as to his actual income.

On October 14, 2020, Ms. Lavigne filed Exceptions of No Cause of Action and Res Judicata, as well as an Opposition to Mr. Braud's Motion for New Trial, asserting that Mr. Braud's Motion for Reduction of Child Support is actually a Motion for New Trial. Ms. Lavigne argues that Mr. Braud was properly served and noticed for the September 8, 2020 child support hearing, but he failed to call any witnesses or produce any paystubs or payroll records to show his recent earnings. She contends that Mr. Braud is not entitled to a new trial or a "redo," because at the time he filed his Motion for Reduction of Child Support on September 17, 2020, there had been no material change in circumstances since the September 8, 2020 child support ruling.

On November 2, 2020, the trial court held a hearing via Zoom on Mr. Braud's motion and Ms. Lavigne's opposition and exceptions. After argument by counsel for the parties, the trial court granted a new trial "for the purpose of allowing the representative from [Mr. Braud's] employer to testify." On December 11, 2020, the trial court signed a written judgment denying Ms. Lavigne's

Exceptions of No Cause of Action and Res Judicata and her Opposition to Mr. Braud's Motion for New Trial.

In Mr. Braud's brief in opposition to this writ application, he argues that his Motion for Reduction in Child Support is not a Motion for New Trial. However, at the hearing on November 2, 2020, counsel for Mr. Braud referred to the motion as a Motion for New Trial. When the trial court asked counsel what she had filed since the judgment setting child support, she stated, "I filed the Motion for New Trial to allow us to bring in the supervisor so that he could provide you additional testimony to corroborate the testimony of my client."

"The characterization of a pleading by the litigant is not controlling. Pleadings are taken for what they actually are and not for what their authors designate them." *Cloud v. Dean*, 15-297 (La. App. 3 Cir. 12/16/15), 181 So.3d 936, 941, citing *State v. Dep't of Children & Family Servs. ex rel. A.L. v. Lowrie*, 14-1025 (La. 5/5/15), 167 So.3d 573, 578.

In his motion, Mr. Braud does not allege that a material change in circumstances has occurred since the prior judgment, warranting a reduction in child support. See La. C.C. art. 142¹ and La. R.S. 9:311(A)(1).² Rather, he requests that he be allowed to present additional testimony as to his income and that his child support obligation be "recalculated using his actual income." Based on the substance of Mr. Braud's motion, we find that it is a Motion for New Trial. Thus, the law pertaining to motions for new trial must be applied here. The appellate standard of review of a ruling on a motion for new trial is whether the

¹ La. C.C. art. 142 provides:

An award of child support may be modified if the circumstances of the child or of either parent materially change and shall be terminated upon proof that it has become unnecessary.

² La. R.S. 9:311(A)(1) provides;

An award for support shall not be modified unless the party seeking the modification shows a material change in circumstances of one of the parties between the time of the previous award and the time of the rule for modification of the award. The material change in circumstances must be substantial and continuing since the last award for support.

trial court abused its discretion. *Marciante v. Marciante*, 12-569 (La. App. 5 Cir. 3/27/13), 113 So.3d 387, 390.

La. C.C.P. art. 1972 sets forth the peremptory grounds upon which a new trial shall be granted, including “[w]hen the verdict or judgment appears clearly contrary to the law and the evidence,” and “[w]hen the party has discovered, since the trial, evidence important to the cause, which he could not, with due diligence, have obtained before or during the trial.” In the present case, Mr. Braud requests recalculation of his child support obligation based on evidence that was in existence and that he was aware of at the time of the September 8, 2020 child support hearing. He has not alleged that he discovered any new evidence since the child support judgment or that his circumstances have changed since that judgment. Also, Mr. Braud has not shown that the judgment was contrary to the law and the evidence that was presented at the hearing. At the September 8, 2020 child support hearing, Mr. Braud argued that he would not earn as much in 2020 as he did in 2019, but he did not present any recent paystubs or other evidence to support his claim that his income has been reduced. After review, we find that Mr. Braud has failed to show that any peremptory grounds warranting a new trial are present here.

La. C.C.P. art. 1973 provides discretionary grounds for granting a new trial, stating, “[a] new trial may be granted in any case if there is good ground therefor, except as otherwise provided by law.” Mr. Braud has failed to show that any material change in circumstances arose between the date of the child support ruling, September 8, 2020, and the date he filed his Motion for New Trial, styled as a Motion for Reduction of Child Support, September 17, 2020. Further, he has failed to explain why he did not present testimony or evidence at the September 8, 2020 hearing as to his current income, which he contends is lower than what he

was earning in 2019. Based on our review, we find that Mr. Braud has failed to show “good ground” for granting a new trial in this matter.

Because no peremptory or discretionary grounds for a new trial have been shown, we find that the trial court abused its discretion by granting Mr. Braud’s Motion for New Trial, and we reverse this ruling.

For the foregoing reasons, we grant Ms. Lavigne’s writ application and reverse the trial court’s ruling granting a new trial for purposes of allowing additional evidence regarding child support. Based on this decision, we preterm discussion of any other issues raised by Ms. Lavigne in this writ application. We also lift the stay order issued by this Court on December 23, 2020.

Gretna, Louisiana, this 19th day of January, 2021.

HJL
SMC
JJM

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
STEPHEN J. WINDHORST
HANS J. LILJEBERG
JOHN J. MOLAISSON, JR.

JUDGES



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NANCY F. VEGA
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SUSAN BUCHHOLZ
FIRST DEPUTY CLERK

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NOTICE OF DISPOSITION CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE DISPOSITION IN THE FOREGOING MATTER HAS BEEN TRANSMITTED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 4-6** THIS DAY **01/19/2021** TO THE TRIAL JUDGE, THE TRIAL COURT CLERK OF COURT, AND AT LEAST ONE OF THE COUNSEL OF RECORD FOR EACH PARTY, AND TO EACH PARTY NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CURTIS B. PURSELL
CLERK OF COURT

20-C-468

E-NOTIFIED

23rd Judicial District Court (Clerk)
Honorable Alvin Turner, Jr. (DISTRICT JUDGE)
No Attorney(s) were ENOTIFIED

MAILED