NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 1347

IN RE: LE'AJAH JAMESIA WYRE, DOB 10/21/2010

Judgment Rendered: DEC 10 2014

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On Appeal from the
20th Judicial District Court
In and for the Parish of East Feliciana
State of Louisiana
Trial Court No. 41504

Honorable George H. Ware, Jr., Judge Presiding

* * * * *

KUHN, J DISSENTS & ASSIGNS REASONS

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* * * * *

BEFORE: KUHN, GUIDRY, HIGGINBOTHAM, THERIOT, AND DRAKE, JJ.

GUIDRY, J. CONCURS.

THERIOT, J CONCURS IN PART AND DISSENTS IN PART WITH REASONS

HIGGINBOTHAM, J.

Appellant, Leslie James Wyre, appeals the judgment of the trial court that ordered him to pay child support in the amount of $513.62 per month to appellee, Adrean M. Robinson. For the following reason, we amend the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

On August 23, 2012, a judgment was rendered by the 20th Judicial District Court for East Feliciana Parish, recognizing Mr. Wyre as the biological father of the minor child, Le'Ajah Jamesia Wyre, born October 21, 2010. Subsequently, on September 6, 2012, a "Joint Stipulation" judgment was rendered orally but was not finally reduced to writing and signed until April 16, 2013. This "Joint Stipulation" judgment superseded the previous child support and custody judgments. It ordered that:

> [T]he parties shall continue with the current visitation schedule as outlined in the January 6, 2012 judgment on the condition that Leslie Wyre works fifty hours or less per week. If Mr. Wyre works more than fifty hours a week, Mr. Wyre's visitation shall revert to every other weekend from Fridays at 8:00 a.m. until Sundays at 8:00 p.m. Said Judgment can be modified with the Ex Parte motion.
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> * * *
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> ...Leslie Wyre's child support obligation shall be set at $592.50 per month, with $269.25[sic] being due on the 1st day of each month, and $296.25 being payable on the 15th day of each month retroactive to November 1, 2011.

The judgment also ordered Mr. Wyre to pay $100.00 per month toward retroactive support totaling $4,535.10. The child support amount was set "without prejudice to the right of either side to seek a redetermination." During

the hearing, Mr. Wyre's attorney pointed out that the stipulation regarding Mr. Wyre working over fifty hours per week would decrease the overtime Mr. Wyre worked and therefore would decrease his income. The trial court acknowledged during the hearing that Mr. Wyre's "income picture" might change and noted that if after 90 days the parties could not agree that a change was needed, then a rule could be filed and the issue could be brought back before the court.

On November 1, 2012, Mr. Wyre filed a "Motion to Reduce Child Support and to Reset Hearing for Motion for Contempt and Second Motion for Contempt." The hearing was held on March 18, 2013. After the hearing, judgment was signed on July 26, 2013, ordering Mr. Wyre to pay child support in the amount of $513.62 retroactive to November 2, 2012, and to continue to pay $100.00 per month toward his retroactive support for a total payment of $613.20, payable in two equal installments of $306.81 due on the first and fifteenth of each month. It is from this judgment that Mr. Wyre appeals.

DISCUSSION

Generally, an award of child support is entitled to great weight and will not be disturbed on appeal absent an abuse of discretion. **Harang v. Ponder**, 2009-2182 (La. App. 1 Cir. 3/26/10), 36 So.3d 954, 967, writ denied, 2010-0926 (La. 5/19/10), 36 So.3d 219. Voluntary unemployment or underemployment is a fact-driven consideration. The trial court has wide discretion in determining the credibility of witnesses, and its factual determinations will not be disturbed on appeal absent a showing of manifest error. Whether a spouse is in good faith in ending or reducing his or her income is a factual determination which will not be disturbed absent manifest error. **Romanowski v. Romanowski**, 2003-0124 (La. App. 1 Cir. 2/23/04), 873 So.2d 656, 662. We cannot substitute our findings for the reasonable factual findings of the trial court. See **Stobart v. State,**

Department of Transportation and Development, 617 So.2d 880, 882-83 (La. 1993).

At the hearing on the motion to reduce child support, the trial court stated that it was of the opinion that both sides of the litigation were attempting to manipulate the system and were "fooling around with their employment depending on what their court situation is or may be." The trial court did not deny Mr. Wyre's motion to decrease support but attributed $4,180.00 per month as income to Mr. Wyre and $900.00 income per month to Ms. Robinson. This resulted in a reduction of only $78.88 per month.[1]

In his first assignment of error, Mr. Wyre contends that the trial court erred in imputing a monthly income of $4,180.00 to him. Mr. Wyre based this assignment of error on the argument that his good faith effort to reduce his work hours to less than fifty hours per week pursuant to the judgment rendered on September 6, 2012, should not be considered to constitute underemployment. The September 6, 2012 judgment stated that his fifty-fifty custody of his minor daughter would be reduced to every other weekend in the event his employment should require him to work over fifty hours per week. After careful review of the record before us, we agree with Mr. Wyre's contention.

At the hearing, Mr. Wyre testified that his income had decreased since the September 6, 2012 joint stipulation. His income using his check stubs, was set at $4,180.00 per month in the previous child support award. At that time, he worked for VIP International. At VIP, his pay rate was $13.75 per hour, but he worked a significant amount of overtime. Mr. Wyre testified that he continued to work at VIP after the parties' September 6, 2012 stipulation. In response to questions from the court, Mr. Wyre testified that VIP had reneged on its

[1] $78.88= $592.50 (Child support awarded in the September 6, 2012) -$513.12 (Child support awarded in the judgment on appeal).

assurance to him that he would not be required to work more than fifty hours per week in consideration of his desire to meet the court-ordered requirement that he work less than fifty hours a week in order to maintain his fifty-fifty split custody arrangement. Contrary to this previous assurance, he was told that he could either resign or work on a project for VIP for a few weeks in Canada. In response, Mr. Wyre resigned. Thereafter, he got a job at Barber Brothers making $10.00 an hour, working 40-45 hours per week.

During the hearing, the following colloquy took place between Mr. Wyre and opposing counsel on cross-examination:

> Q. Okay. Are you aware the Court never asked you to work less hours? Aren't you aware of that?
>
> A. No, we did agree upon fifty hours or less a week.
>
> Q. Are you aware that the Court gave two scenarios. One that happened if you worked fifty hours a week and one that happened if you worked more than fifty hours a week. Are you aware of that? There were two scenarios presented.
>
> A. Uh-huh.
>
> Q. But are you also aware that the Court did not dictate that you work less than fifty hours. It just provided what would occur in the event that you did, but it didn't tell you you had to work a certain number of hours. Are you aware of that?
>
> A. Yes.
>
> * * *
>
> Q. So isn't it true that you voluntarily quit your job?
>
> A. Yes.

As pointed out by opposing counsel, it is accurate that the court did not require Mr. Wyre to quit his job; however it required Mr. Wyre to make an extremely difficult decision.

After thorough consideration of the evidence in this case, despite the court's conclusion that the parties were fooling around with their employment, we conclude that the trial court abused its discretion in signing a stipulation that required Mr. Wyre to work less than fifty hours per week if he wanted to continue to share custody of his child, but using his salary from a time period when he worked significantly more hours than that. It is patently unfair to require Mr. Wyre to work less than fifty hours per week if he wants to share custody of his child, but to set his child support based on a salary that required him to work considerably more than fifty hours per week. For that reason, we find the trial court abused its vast discretion in setting Mr. Wyre's salary at $4,180.00 and in its award of child support.

Further, La. R.S. 9:315.11 provides "If a party is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of income earning potential, **unless the party** is physically or mentally incapacitated, or **is caring for a child of the parties under the age of five years**." Mr. Wyre and Ms. Robinson share fifty-fifty custody of Le'Ajah, who is under the age of five.

After thorough review of the record and considering that the minor child is under the age of five, we based child support on the actual income of the parties at the time of the hearing. Mr. Wyre presented four check stubs for his weekly pay. After averaging the amount he was paid per week over the four week period and multiplying by 52 weeks in the year, Mr. Wyre's average yearly gross salary totaled $23,517.00.[2] Using these figures, his average salary is $1,959.75 per month, which is the number we used for the child support

[2] $527 + $542 + $365 + $375 = $1,809.00
$1,809.00/4 = $452.25
$452.25 x 52(weeks in a year) = $23,517.00

calculation. Ms. Robinson had no income at the time of the child support determination.[3]

I. CHILD SUPPORT CALCULATION

The following calculation using worksheet B for shared custody in La. R.S. 9:315.20 results in Mr. Wyre's child support obligation to Ms. Robinson being reduced to $278.00 per month.

In Re: Le'Ajah Jamesia Wyre	Mother	Father	
1. MONTHLY GROSS INCOME	$ 0.00	$ 1959.75	
a. Preexisting child support payment.	$ 0.00	$ 0.00	
b. Preexisting spousal support payment.	$ 0.00	$ 0.00	
2. MONTHLY ADJUSTED GROSS INCOME	$ 0.00	$ 1959.75	
3. COMBINED MONTHLY ADJUSTED GROSS INCOME			$1959.75
4. PERCENTAGE SHARE OF INCOME	% 0.00	% 100.00	
5. BASIC CHILD SUPPORT OBLIGATION			$ 370.76
6. SHARED CUSTODY BASIC OBLIGATION			$ 556.13
7. EACH PARTY'S THEOR. CHILD SUPPORT OBLIGATION	$ 0.00	$ 556.13	
8. PERCENTAGE WITH EACH PARTY	% 50.00	% 50.00	
9. BASIC CHILD SUPPORT FOR TIME WITH OTHER PARTY	$ 0.00	$ 278.00	
a. Net Child Care Costs (federal tax credit - YES/NO)	NO $ 0.00	NO $ 0.00	$ 0.00
b. Child's Health Insurance Premium Cost	$ 0.00	$ 0.00	$ 0.00
c. Extraordinary Medical Expenses	$ 0.00	$ 0.00	$ 0.00
d. Extraordinary Expenses	$ 0.00	$ 0.00	$ 0.00
e. Optional. Minus Extraordinary Adjustments	$ 0.00	$ 0.00	$ 0.00
10. TOTAL EXPENSES/EXTRAORDINARY ADJUSTMENTS			$ 0.00
11. EACH PARTY'S PROPORTIONATE SHARE	$ 0.00	$ 0.00	
12. PROPORTIONATE SHARE OF DIRECT PAYMENTS	$ 0.00	$ 0.00	
13. EACH PARTY'S CHILD SUPPORT OBLIGATION	$ 0.00	$ 278.00	
14. GUIDELINE CHILD SUPPORT ORDER	$ 0.00	$ 278.00	
15. RECOMMENDED CHILD SUPPORT ORDER	$ 0.00	$ 278.00	

CONCLUSION

For the reasons set forth hereinabove, we amend the judgment of the trial court to reduce Mr. Wyre's monthly child support obligation to $278.00,

[3] At the time of the prior child support hearing, Ms. Robinson was employed at Faith and Hope Independent Living (hereinafter "Faith and Hope") as a direct service worker. She reported an income of $535.56 per month. At the hearing on the motion to reduce child support, Ms. Robinson testified that she had lost that job. She testified that she was currently unemployed, but that she had searched for another job, without success.

payable each month in two equal installments of $139.00. Mr. Wyre is ordered to continue to pay $100.00 per month toward retroactive support until it is paid in full. All costs of these proceedings are assessed to Ms. Adrean Robinson.

AMENDED, AND AS AMENDED, AFFIRMED.

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 1347

IN RE: LE'AJAH JAMESIA WYRE, DOB 10/21/2010

THERIOT, J., concurs in part, dissents in part.

I concur with the majority that the trial court erred and the judgment should be reversed. However, I disagree with the finding that the trial court abused its vast discretion. Voluntary unemployment or underemployment for purposes of calculating child support is a question of good faith on the part of the obligor-party. See, *Romanowski v. Romanowski*, 03-0124 (La. App. 1st Cir. 2/23/04) 873 So. 2d 656, 660; see also, *Romans v. Romans*, 01-587 (La. App. 3rd Cir. 10/31/01), 799 So. 2d 810, 812. The trial court has wide discretion in determining the credibility of witnesses and its factual determinations will not be disturbed on appeal absent a showing of manifest error. See, *Romanowski*, 03-0124, 873 So. 2d at 662. Whether a party is in good faith in ending or reducing their employment is a factual determination which will not be disturbed absent manifest error. *Id.*

I find the trial court legally erred by not properly applying La. R.S. 9:315.11 to the facts of this case. I would reverse the judgment based on the legal error. Furthermore, I disagree with the portion of the opinion that calculates the monthly child support obligation. I would remand the matter to the trial court with instructions.

IN RE: **FIRST CIRCUIT**

LE'AJAH JAMESIA **COURT OF APPEAL**

WYRE **STATE OF LOUISIANA**

DOB 10/21/2010 **NO. 2013 CA 1347**

KUHN, J., dissenting.

The trial court is vested with broad discretion in deciding child custody cases. A trial court's determination regarding child custody will not be disturbed absent a clear abuse of discretion. ***Romanowski v. Romanowski***, 2003-0124 (La. App. 1st Cir. 2/23/04), 873 So.2d 656, 659. And the trial court's conclusions of fact regarding financial matters underlying an award of child support will not be disturbed in the absence of manifest error. ***Id.***, 873 So.2d at 662. Among these is the voluntary unemployment of an obligor-parent, which is a fact-driven consideration. The trial court has wide discretion in determining the credibility of witnesses, and its factual determinations will not be disturbed on appeal absent a showing of manifest error. Whether a parent is in good faith in ending or reducing his or her income is a factual determination which will not be disturbed absent manifest error. ***Id.***

The majority has usurped the trial court's role and decided to retry the case based on its belief that "[i]t is patently unfair to require Mr. Wyre to work less than fifty hours per week if he wants to share custody of his child, but to set his child support based on a salary that required him to work considerably more than fifty hours per week." ***In re: Wyre***, 2013-1346 at p. 6 (an unpublished opinion). This belief, of paramount importance to the majority, overlooks the trial court's express finding that "both sides of this litigation are attempting to manipulate the system, and they are fooling around with their employment depending on what their court

situation is or may be." Nowhere does the majority explain how this finding by the trial court was manifestly erroneous or clearly wrong.

The majority in retrying the issue of whether Mr. Wyre was voluntarily underemployed has on appeal merely substituted its own conclusion as to whether Mr. Wyre was in good faith in reducing his income, which is a factual determination uniquely allotted to the trial court in our system of justice. It is not appropriate for an appellate court to ignore our standard of review. Courts of appeal are tasked with the assignment of reviewing -- not retrying – cases, and when an appellate court chooses to retry the facts in instances where there is neither legal error nor manifest error, the respective role of the trial court versus the court of appeal is ignored. See ***Chauvin v. Terminix Pest Control***, 2011-1006 (La. App. 1st Cir. 6/28/12), 97 So.3d 476, 486 (Kuhn, J., concurring). Without manifest error, under the guise of "abuse of discretion," the effect of the majority's decision is to give no deference whatsoever to the trial court on matters such as credibility of the witnesses, findings of fact, and ultimately a proper exercise of the vast discretion afforded the trial court. The majority, though sitting as a court of appeal, in substituting the majority's judgment for that of the trial court strongly suggests cognitive dissonance, something any appellate court should, at all times, diligently avoid.

Given that there was no manifest error in the trial court's conclusion that Mr. Wyre was voluntarily underemployed, applying the plain language of La. R.S. 9:315.11, as interpreted by this court, the trial court erred by considering Mr. Wyre's earnings potential for the 50% of the time he has custody of the minor child.

Pursuant to La. R.S. 9:315.11, the trial court was only permitted to use one-half of this figure, i.e., $2,090.00, based on the fact that Mr. Wyre's earnings

potential could only be factored into the calculation for the one-half of the time he did not have custody of the minor child of the parties who was under five. The other half of the time, the figure of $1,862.00/month is correctly indicated from the pay stubs received into evidence in connection with Mr. Wyre's testimony concerning his less remunerative earnings at Barber Brothers. Half of $1,862.00 is $931.00. Adding $2,090.00 in potential earnings to the actual earnings of $93.00 results in a total compensation for child support calculation purposes of $3,021.00, which is $1,159.00 less than $4,180.00, the amount determined by the trial court, which is a difference of approximately 28%. Therefore, I would amend the judgment of the trial court in order to reflect the effect of La. R.S. 9:315.11 on the calculation of child support.

In order to do this, the Child Support Worksheet R.S. 9:315.9(B), annexed to the written judgment of July 26, 2013, must be reworked. In that worksheet, the trial court added the income attributable to Mr. Wyre of $4,180.00 to that attributable to Ms. Robinson of $900.00 to arrive at a total of $5,080.00. This meant that 82% of the income was attributable to Mr. Wyre and 18% to Ms. Robinson. The shared custody basic obligation was calculated to be $1,252.50 (1.5 times the La. R.S. 9:315.2(D) Basic Child Support obligation of $835.00). This figure was then divided between the two parties because of their joint 50/50 joint custody based on the 82% to 18% ratio of the incomes of the parties, resulting in a Basic Child Support Obligation of $512.62 for Mr. Wyre and $112.73 for Ms. Robinson.

Based on the new figures applicable under La. R.S. 9:315.11, i.e., $3,021.00 for Mr. Ware and $900.00 for Ms. Robinson, the new joint income figure is $3,921.00. Of this amount, Mr. Wyre's income constitutes 77% of the total and Ms. Robinson's income constitutes 23%. Based on the La R.S. 9:315.19 Schedule

of Support, the Basic Child Support is $681.00. Multiplying this amount by 1.5 in order to establish the joint obligation of the parties pursuant to La. R.S. 9:315.9(B)(2) results in a joint obligation total of $1,021.50. Mr. Wyre's 77% share of this amount is $786.56. This figure is reduced by 50% to reflect the 50/50 joint custody arrangement, resulting in a final support obligation on the part of Mr. Wyre of $393.28/month. Accordingly, I would order Mr. Wyre to pay $393.28 per month in child support to Ms. Robinson.

For these reasons, I dissent.