STATE OF MICHIGAN

COURT OF APPEALS

PAMELA VOSS,

Plaintiff-Appellant,

v

GARY B. PERKINS,

Defendant-Appellee.

UNPUBLISHED
November 9, 2001

No. 222716
Wayne Circuit Court
LC No. 86-631134-DM

Before: Zahra, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

In this post-judgment divorce matter, plaintiff appeals by leave granted from the circuit court's order settling the amounts of arrearages and other expenses owed by defendant to plaintiff. We reverse and remand for further proceedings consistent with this opinion.

Plaintiff and defendant divorced in 1988. The judgment of divorce contained a number of provisions regarding alimony, child support, property division, and debt payment. Unfortunately, over the next decade, the parties fought an almost continuous battle over the exact amounts that defendant owed to plaintiff. The instant appeal arises from the circuit court's latest attempt to settle the amounts of arrearages and other expenses owed by defendant to plaintiff. Two of the circuit court's post-judgment orders are of particular relevance in resolving the instant appeal: (1) a consent order entered on July 25, 1989, and (2) a consent order entered on October 29, 1998.

The 1989 order established specific sums that defendant owed plaintiff for arrears on child support and alimony payments, along with other expenses. The 1989 order also provided that interest "shall accrue upon all unpaid balance[s] of the obligations set forth in this Order at the rate of 9.5% percent [sic] per annum, with said payments to first be applied to accrued interest and the remainder to principal."

The 1998 order required the Friend of the Court (FOC) to conduct an audit regarding defendant's child support and alimony arrearages, along with certain other expenses, through the period ending December 31, 1997. The 1998 order provided that the parties would be "bound by the arrearages calculated" by the FOC. In addition, the 1998 order provided that "the balance of the terms of the previous orders of this Court not inconsistent with the instant order remain in full force and effect."

The FOC conducted the audit and prepared an audit letter dated November 28, 1998. Although the audit finalized some of defendant's arrearages, it failed to resolve two issues: (1) what rate of interest should apply to defendant's indebtedness, and (2) whether some of defendant's debts to plaintiff had been discharged in bankruptcy court. Plaintiff subsequently filed a motion in the circuit court, seeking resolution of those two outstanding issues. The circuit court refused to award plaintiff any of the requested interest. The circuit court refused to assess certain surcharges on defendant's support arrears. Further, the circuit court refused to order defendant to pay the amounts that defendant claimed were discharged through bankruptcy. Plaintiff appeals by leave granted. We reverse.

Plaintiff first contends that the circuit court erroneously refused to award interest on the support arrearages that defendant owed her. Plaintiff argues that the 1989 order clearly set forth defendant's obligation to pay 9.5 percent interest on certain unpaid obligations. Because the 1998 order did not change that provision, plaintiff argues that defendant's obligation to pay the interest remained intact. Finally, because the FOC audit reserved the issue of interest for resolution by the circuit court, plaintiff argues that the binding nature of the FOC audit does not preclude an award of interest. We agree.

The 1989 consent order established defendant's obligation to pay interest at the rate of 9.5 percent per annum.[1] In 1989, support orders were considered judgments with the full force, effect, and attributes of a judgment of this state. MCL 552.603; *People v Law*, 459 Mich 419, 430; 591 NW2d 20 (1999). That requirement meant that "interest is mandatory with respect to support arrearages at the statutory rate, just as it had traditionally been with other civil judgments." *Id*. However, the 9.5 percent interest rate provided by the consent judgment exceeded the maximum amount of interest chargeable under state law. *Clifford v Clifford*, 434 Mich 480, 481; 453 NW2d 675 (1990). "The entry of a consent judgment which, in part, does violate the law must be corrected." *Id*. The proper remedy for such an error is not to disallow the payment of any interest, but to reduce the interest to the maximum allowable rate. *Id*. Accordingly, the proper rate of interest applicable to the amounts contained in the parties' 1989 consent order is seven percent. *Id*. The interest is mandatory and the circuit court committed error requiring reversal with it refused to award the interest. *Law*, *supra* at 430.

The circuit court based its refusal to award interest on the failure of the FOC audit to specifically award plaintiff the requested interest. We note that the FOC audit did not reject plaintiff's claim to the requested interest. Rather, the FOC stated:

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[1] Defendant argues that the 1998 order completely supplanted the 1989 order. Therefore, defendant argues that the interest provision contained in the 1989 order is unenforceable. We disagree. The 1998 order did provide that both parties would be "bound by the arrearages calculated by" the FOC. If the FOC audit had concluded that defendant did not owe plaintiff any interest on the arrearages, then that determination would have bound the parties. However, as set forth above, the FOC did not do so. Instead, the FOC audit indicated that plaintiff was entitled to an unspecified amount of interest, as calculated under the 1989 order. Accordingly, defendant's argument is without merit.

> There is also an issue of calculation of 9.5%. However, the paragraph on page 3 of the Court Order dated July 25, 1989 is very confusing as to how to calculate this interest and on what figure. Therefore, I leave it up to the Courts [sic] decision in interpreting this paragraph.

Clearly, this excerpt reveals that the FOC believed that plaintiff was entitled to an award of interest as provided in the 1989 consent order. The FOC auditor simply did not complete the required calculations because he found them too involved and confusing. The FOC auditor therefore referred the matter back to the circuit court, where the court and the parties could presumably seek the assistance of expert witnesses in making the calculations. We conclude that the circuit court erroneously refused to make the appropriate calculations and erroneously refused to award plaintiff the required interest.

Defendant argues that the trial court properly refused to award plaintiff interest because plaintiff came to the court with unclean hands. Assuming, without deciding, that this could provide a proper basis for ignoring the statutory mandate to award interest on a 1989 support order, there is no evidence in the record that such misconduct on the part of plaintiff occurred. Defendant relies on assertions made by his attorney regarding plaintiff's alleged conduct. However, attorneys' statements and arguments are not evidence. *People v Mayhew*, 236 Mich App 112, 123 n 5; 600 NW2d 370 (1999). Our review of the record reveals no evidence supporting defendant's position that plaintiff has unclean hands.

Plaintiff next contends that the circuit court erroneously refused to assess statutorily required surcharges on defendant's support arrears. Effective January 1, 1996, the legislature amended MCL 552.603 to provide that support arrears would no longer accrue statutory interest. MCL 552.603(7); *Law*, *supra* at 430, n 14. Instead, support arrears owed after that date became subject to a statutory eight percent surcharge. MCL 552.603a(1); *Law*, *supra* at 430, n 14. As this Court explained in *Adams v Linderman*, 244 Mich App 178, 184-185; 624 NW 2d 776 (2000),[2] the plain statutory language "mandates the imposition of an eight percent surcharge on child support payments that are past due and deprives the circuit court of discretion to modify such surcharges."[3] Further, *Adams* explained that a circuit court lacks the discretion to retroactively modify a party's accumulated support arrearages. *Id.* at 185. Therefore, we agree with plaintiff that the circuit court must add the statutorily required surcharges to defendant's arrearages due and owing after January 1, 1996.

Finally, plaintiff argues that the circuit court erroneously refused to order defendant to pay the amounts that defendant claimed were discharged through bankruptcy. This issue involves several items that defendant was required to pay plaintiff under the terms of the 1989

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[2] This Court issued its decision in *Adams* after the circuit court entered the decision and order that plaintiff appeals here.

[3] While the *Adams* opinion involved only child support arrearages, we note that the surcharge applies to all "support" payments entered in a domestic relations matter, including both child support and spousal support. MCL 552.602; MCL 552.603; MCL 552.603a.

order.[4] The FOC audit determined that these amounts equaled $12,524.38. However, the audit also noted defendant's claim that these items had been discharged in bankruptcy. Quite reasonably, the FOC auditor stated that, because he is "neither an attorney nor a CPA," he could not determine whether these obligations had been discharged in bankruptcy. As he had done with the interest calculation, the FOC auditor explicitly referred this matter back to the circuit court, which was better suited to determining the status of defendant's bankruptcy petition. Again, as it had done with the interest calculation, the circuit court refused to award plaintiff the $12,524.38 based on the failure of the FOC audit to specifically award those funds to plaintiff. We conclude that the circuit court committed error requiring reversal when it failed to award these funds to plaintiff. Defendant carried the burden of proving that this debt was discharged through bankruptcy. Had defendant received a discharge, he could very easily have presented a certified copy of it into evidence. Because he failed to do so, there is no basis in the record to conclude that defendant ever received a discharge which would relieve him of the obligation to pay these debts.

We remand this case to the circuit court for a calculation of amounts that defendant owes to plaintiff. That calculation shall include: (1) the interest due on support arrearages through December 31, 1995, at the rate of seven percent per annum, (2) surcharges at the rate of eight percent per annum on arrearages owed after that date, and (3) the $12,524.38 that defendant owed to plaintiff under the 1989 consent order. During remand proceedings, if defendant provides the circuit court with a certified copy of a discharge order from the bankruptcy court

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[4] This issue involves items D through H on page 3 of the 1989 order:

> D. Reimbursement for pre-Judgment utility expenses in the amount of One Thousand One Hundred Twelve and 13/100 ($1,112.13) Dollars.
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> E. Reimbursement for pre-Judgment household expenses in the amount of One Thousand Seven Hundred Nine and 25/100 ($1,709.25) Dollars.
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> F. Reimbursement for tuition expenses for the minor children in the amount of Two Thousand Eight Hundred Three ($2,803.00) Dollars, accrued as of May 11, 1989 (consisting of One Thousand One Hundred Thirteen ($1,113.00) Dollars pre-Judgment and One Thousand Six Hundred Ninety ($1,690.00) Dollars post-Judgment until May 11, 1989).
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> G. Reimbursement and/or indemnification for payment to Kenneth Karam in the amount of Five Thousand Five Hundred ($5,500.00) Dollars.
>
> H. Reimbursement and/or indemnification for withheld 1988 Federal Income Tax refund in the amount of One Thousand Four Hundred ($1,400.00) Dollars.

clearly demonstrating that the $12,524.38 owed to plaintiff under the 1989 order was in fact discharged, the circuit court shall not award that amount to plaintiff.

Reversed and remanded. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Michael R. Smolenski
/s/ Michael J. Talbot