STATE OF MICHIGAN

COURT OF APPEALS

DIANE LYNN STOREY, f/k/a DIANE LYNN RIEMERSMA, f/k/a/ DIANE LYNN ARMSTRONG,

Plaintiff-Appellee,

v

RODGER WAYNE RIEMERSMA,

Defendant-Appellant.

UNPUBLISHED
May 8, 2008

No. 277599
Kent Circuit Court
LC No. 83-048746-DM

Before: White, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court for consideration as on leave granted. Defendant challenges the trial court's initial order denying his motion to reduce a significant amount of child support arrearage and the subsequent order denying his motion for reconsideration. We reverse and remand.

The parties were married on February 10, 1982, and were divorced on July 29, 1983. Pursuant to the divorce judgment, defendant was to pay $35 per week in child support for the parties' son. After defendant's visitation rights were suspended in December 1983, he discontinued paying support. Over the next two years, bench warrants were issued against defendant for his non-payment of support. By 1991, the support arrearage amounted to $13,989.

In May 1991, defendant moved the trial court to reinstate his visitation rights and for modification of the support arrearage. In the motions, he averred that he had been in prison since May 1984, and that he was serving a 5- to 22½-year sentence. He stated that he was employed in the prison system and was then earning $35.40 per month. He offered to pay $10 per month. The trial court entered an order allowing service on plaintiff by mail. The court file reflects that plaintiff was first served at her home address by mail on June 3, 1991.

When there was no action on defendant's motions for several months, he wrote to the clerk of the court in September 1991. A deputy clerk responded and told defendant that his motions had been lost. The clerk's letter advised defendant to refile his motions, which he did in January 1992. In further correspondence, defendant was twice advised that he had to file a proper notice of hearing. Letters between defendant and a deputy court clerk reveal that his motions for renewal of visitation and to reduce accumulated child support were both before the

trial court. The record contains handwritten notes by the trial judge, indicating that he would hear and decide defendant's motions as soon as a notice of hearing was filed.

A proof of service was filed and a hearing date was scheduled for June 26, 1992. A postal service receipt in the court file established that plaintiff was served at her home on June 5, 1992. The record also contains a letter to the trial judge written by plaintiff dated June 15, 1992, in which she explains why defendant's motions should be denied. Plaintiff referenced both motions in the letter and stated, "I will be in the courtroom on June 26 at 9:00am as the papers, Rodger has filed, request."

In an order dated August 24, 1992, the trial court ruled on defendant's motion to reinstate visitation but, without explanation, failed to address the question of his child support arrearage.

On March 8, 2006, defendant filed another motion to reduce the support arrearage. He stated that he had been released from prison in November 2005 after serving his full term. The motion acknowledged that Michigan law had changed via MCL 552.603(2) and that trial courts were now prohibited from modifying properly entered support orders to grant retroactive reductions in support arrearages. See *McLaughlin v McLaughlin*, 255 Mich App 475; 660 NW2d 784 (2003). However, defendant asserted that the undecided motion filed in 1991 preserved his right to challenge the child support arrearage.

Based on the recommendation of a hearing referee, the successor trial judge initially determined that defendant's 1991 petition did preserve his challenge so on April 21, 2006 an order was entered discharging all child support arrearages commencing on May 24, 1991. Thereafter, plaintiff wrote to the trial judge, stating that she had no knowledge of the hearing and asking that the order be rescinded. Without a hearing, the trial court reversed its earlier order and entered an opinion and order reinstating the support arrearage. The court's opinion found that defendant had not complied with Michigan court rules and, thus, his 1991 motions were not properly before the original trial judge and his claim for a reduction in his support arrearage was not preserved. The judge held that MCL 552.603(2) precluded reduction of the substantial arrearage.

On appeal, defendant asserts the trial court erred in finding there was no evidence that he had properly filed and noticed his motion to modify child support until he filed his 2006 motion. We agree.

This Court reviews findings of fact in the trial court for clear error. A decision is clearly erroneous when, although there may be some evidence to support the ruling, we are left with a definite and firm conviction on the whole record that a mistake has been made. *Bynum v ESAB Group, Inc*, 467 Mich 280, 285; 651 NW2d 383 (2002).

The trial court record contains a proof of service, notarized on June 8, 1992, along with a United States Postal Service receipt showing that the motions were delivered to plaintiff's home on June 5, 1992. Moreover, plaintiff's letter to the original trial judge, which was dated June 15, 1992, referenced both the motion to renew visitation and the motion to reduce the support arrearage. Plaintiff's letter also noted the proper date and time set for the hearing on defendant's motions, as reflected in the proof of service. Under MCR 2.107(D) and MCR 2.119(C), the

motions were timely served and noticed. Hence, we conclude that the trial court clearly erred in concluding otherwise.

Defendant preserved his challenge to the child support arrearage. The arrearage should be reduced in accordance with the holding in *Pierce v Pierce*, 162 Mich App 367; 412 NW2d 291 (1987).

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski