IN THE COURT OF APPEALS OF IOWA

No. 7-108 / 96-1225

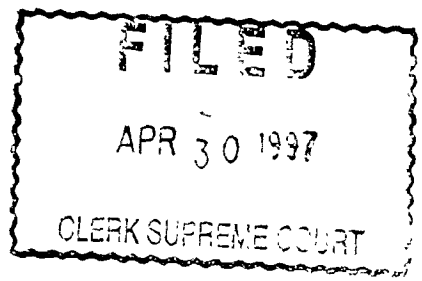
SCOTT J. NELSON,

Plaintiff,

vs.

IOWA DISTRICT COURT FOR AUDUBON COUNTY,

Defendant.



Appeal from the Iowa District Court for Audubon County, James M. Richardson, Judge.

The supreme court granted Scott Nelson's petition for writ of certiorari from a district court order finding him in contempt for failing to pay increased child support ordered pursuant to a modification decree. **WRIT ANNULLED.**

David L. Hammer and Angela C. Simon of Hammer, Simon & Jensen, Dubuque, for plaintiff.

J. C. Salvo and Richard C. Schenck of Salvo, Deren, Schenck & Lauterbach, P.C., Harlan, for defendant.

Heard by Sackett, P.J., and Cady and Vogel, JJ.

SACKETT, P.J.

Plaintiff Scott J. Nelson challenges the district court's finding he was in contempt of court for failure to pay an increase in his child support. He further contends certain in-chamber communications between adverse counsel and the trial judge tainted the proceedings and he should not be required to pay his former wife's attorney fees. The supreme court granted plaintiff's petition for writ of certiorari from the order finding him in contempt.[1]

Plaintiff's marriage to Jane Herbert was dissolved in September 1989. Plaintiff was ordered to pay child support of $137.50 a month for each of the parties' two children. In 1993, the decree was modified and the child support was increased to $425 a month for both children. Plaintiff has paid the child support as ordered under the original decree and the 1993 modification.

Jane filed a second application for modification seeking an increase in child support. On December 28, 1995, the trial court increased plaintiff's child support obligation for both children to $695 a month. Plaintiff appealed the order for increase but did not post a supersedes bond. He continued to pay the $425 a month for both children and $181 a month for their insurance, but did not pay the ordered increase.

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[1] The supreme court granted the petition and ordered a stay of the contempt order upon plaintiff's payment of a $500 bond.

Jane filed an application to hold plaintiff in contempt of court for his failure to pay the increased amount. The trial court found the appeal did not stay the order for increased support and plaintiff had the means to pay the increased support but had failed to pay it. Plaintiff was found in willful contempt and ordered confined to the county jail for twenty days. Mittimus was withheld for sixty days to allow plaintiff to purge himself of the contempt by bringing all child support current.

Plaintiff contends he is not able to pay the increased amount and the finding he is in contempt is arbitrary and capricious, contrary to law, and an abuse of discretion. He testified his income had only increased $35 a month between the two modification hearings and he has a net monthly income for the purpose of applying the child support guidelines of $1948.80.

Plaintiff advances there is no showing his failure to pay is willful. He contends he should not be incarcerated for his inability to meet an impossible burden. Plaintiff maintains there is no evidence in the record to support the court's conclusion he is capable of paying the extra child support. He asserts his inability to pay is the very reason he filed an appeal of the modification order. Plaintiff, a practicing lawyer, has a student loan obligation of $417 monthly. He contends he must pay this amount as his professional license is contingent on the student loans being current. He further contends in the first modification action his student loan obligations were considered.

Certiorari is an action at law to test the legality of actions taken by a district court or tribunal. Iowa R. Civ. P. 306; *Zimmerman v. Iowa Dist. Ct.*, 480 N.W.2d 70, 74 (Iowa 1992). Our review is for correction of errors at law and not de novo. *Amro v. Iowa Dist. Ct.*, 429 N.W.2d 135, 140 (Iowa 1988). The factual findings of the district court are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1); *Zimmerman*, 480 N.W.2d at 74.

An action for contempt of court is treated as a criminal proceeding and no person may be punished unless the contempt is established by proof beyond a reasonable doubt. *Phillips v. Iowa Dist. Ct.*, 380 N.W.2d 706, 709 (Iowa 1986). One defense available in a contempt proceeding is the absence of willfulness in disobeying the order. *In re Marriage of Jacobo*, 526 N.W.2d 859, 866 (Iowa 1995).

A violation of the December 1995 order increasing support has been shown, so the question turns on willfulness and the burden shifts to plaintiff, the alleged contemner. His burden is a burden of production on the defense of his inability to pay rather than a burden of persuasion. *Skinner v. Ruigh*, 351 N.W.2d 182, 185 (Iowa 1984); *see also Ervin v. Iowa Dist. Ct.*, 495 N.W.2d 742, 745 (Iowa App. 1993).

We recognize plaintiff has been prompt in paying all ordered child support and medical insurance except the increased child support obligation resulting from the December 28, 1995 modification. We also recognize plaintiff's current income

provides little or no cushion for the increase, particularly if he is to maintain and keep current his college loan payments. We find in the record a stubborn attitude by both parties. Neither has benefitted from this appeal. Neither will benefit if plaintiff's employment is jeopardized by this action.

Plaintiff has failed to introduce sufficient evidence of his inability to pay. The writ is annulled.

Plaintiff also challenges a closed door in-chambers conference near the time of the contempt proceedings between the trial judge and Jane's lawyer, J. C. Salvo. The supreme court, when granting the writ, ordered a supplemental record be made concerning the conference between Jane's counsel, J. C. Salvo, and the district court judge, James Richardson. Judge Richardson filed an affidavit stating he was discussing an entirely different case with Salvo. Salvo responded by answering interrogatories. Plaintiff additionally claims the private conversation between Salvo and Judge Richardson immediately prior to the contempt hearing gave the appearance of impropriety and tainted the contempt proceedings.

We review this issue de novo on the affidavits and interrogatories submitted. There is no evidence the conference between the attorney and the judge concerned plaintiff's case.

Plaintiff next contends the district court judge should have recused himself because he signed the modification order. Plaintiff did not raise this issue at the trial

court level. Matters not presented to the trial court will not be considered on appeal. *In re Marriage of Gulsvig*, 498 N.W.2d 725 (Iowa App. 1993).

Plaintiff finally maintains that Jane's request for appellate attorney fees should be denied. We award no appellate attorney fees.

WRIT ANNULLED.