IN THE COURT OF APPEALS 11/14/95

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00825 COA

PATRICE B. URSINI A/K/A PATRICE B. BUNYARD

APPELLANT

v.

PAUL STEPHEN BUNYARD

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. RAY HILLMAN MONTGOMERY

COURT FROM WHICH APPEALED: MADISON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

CARSHENA L. BAILEY

ATTORNEY FOR APPELLEE:

SHARON PATTERSON THIBODEAUX

NATURE OF THE CASE: CIVIL - CHILD SUPPORT

TRIAL COURT DISPOSITION: APPELLANT WAS HELD TO BE IN ARREARS IN PAYING CHILD SUPPORT AND ONE HALF OF MEDICAL EXPENSES; AND WAS ORDERED TO PAY $500.00 IN ATTORNEY FEES.

BEFORE THOMAS, P.J., COLEMAN, AND PAYNE, JJ.

THOMAS, P.J., FOR THE COURT:

Paul Bunyard and Patrice Ursini were awarded a divorce in 1982. Ursini was awarded custody of their minor child, Stephanie Diane Bunyard. In 1992, an agreed order was entered into whereby child custody would be changed to Bunyard. In this order Ursini was ordered to pay $100.00 per month in child support. In 1994, Ursini filed a motion to modify alleging that she no longer could afford to pay her child support. She sought to have her child support suspended and a reasonable amount set whereby she could pay off the child support arrearage, or in the alternative that her monthly child support be reduced. Bunyard filed a cross motion for contempt. After a hearing the chancellor found Ursini in contempt of court, ordered that she pay $900.00 in arrearage, $138.21 for medical expenses, and awarding attorney fees in the amount of $500.00.

Ursini appeals that order of contempt to this Court assigning three issues. We find the appeal to have merit. The chancellor was in error in refusing to allow Ursini to admit evidence which might tend to show a material change in circumstances.

FACTS

During the marriage of Paul Bunyard and Patrice Ursini, one child was born, Stephanie Diane Bunyard. The parties marriage ended by a judgment of divorce on September 17, 1982. Ursini was given custody. On December 4, 1992, an agreed order was entered in the Madison County Chancery Court whereby the custody of the minor child was changed to Bunyard, subject to visitation rights of Ursini. In addition, Ursini was ordered to pay child support in the sum of $100.00 per month except for the months of June, July, and August, which are months the minor child was visiting Ursini. Furthermore, each party was ordered to equally share all medical and dental expenses not covered by insurance.

At the time of the entry of the agreed Order Modifying Former Judgment giving Bunyard custody, Ursini was unemployed but receiving disability benefits from her former employer Porcelain Metals Corporation in Louisville, Kentucky. Ursini received $175.00 per week from the Fortis Benefits Insurance Company. Ursini received these benefits until May of 1993.

Ursini claims that she has a back condition which affects her ability to work. Furthermore, she testified that she has been under doctor’s care since June of 1993. Her total income a month is the following: sixty dollars a month in utility allowance; one hundred sixty-two dollars in AFDC; two hundred and six dollars in food stamps; which makes a total monthly income of four hundred twenty-eight dollars. Her monthly bills are two hundred thirty-nine dollars and seventy-five cents per month.

DISCUSSION

We note at the outset that Bunyard, the Appellee in this case, has failed to file a brief with this Court. "The rule has been stated in numerous cases that the failure of the appellee to file a brief is tantamount to a confession of error and will be accepted as such unless we can with confidence say, after considering the record and brief of appellant, that there was no error." *Snow Lake Shores Prop. Owners v. Smith*, 610 So. 2d 357, 361 (Miss. 1992) (quoting *Burt v. Duckworth*, 206 So. 2d 850, 853 (Miss. 1968)). After reviewing the record and appellant’s brief we cannot say with confidence that there was no error.

In determining whether there should be a modification of child support, chancellors are given broad

discretion. *Morris v. Stacy*, 641 So. 2d 1194, 1196 (Miss. 1994). However, "we will reverse when [the chancellor] is manifestly in error in his finding of fact or has abused his discretion." *Hammett v. Woods*, 602 So. 2d 825, 828 (Miss. 1992).

In *Gregg v. Montgomery*, 587 So. 2d 928, 933 (Miss. 1991), our supreme court stated that:

> [i]n order to modify a child support payment, it must be shown that there has been a material or substantial change in circumstances of one or more of the interested parties: the father, the mother, and the child or children, arising subsequent to entry of the decree to be modified.

The burden of proving that there has been a material change in circumstances rests upon the party that seeks the modification. *McEachern v. McEachern*, 605 So. 2d 809, 813 (Miss. 1992). The party who bears this burden must be given the opportunity to prove the material change.

During the modification hearing Ursini attempted to submit the clinical notes of her doctor, Dr. Robert McCarron, to show that she was disabled. After an objection by Bunyard's counsel, the chancellor ruled that the information was hearsay and would therefore not be admitted.

Mississippi Rules of Evidence 803(4) provides:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, regardless of to whom the statements are made, or when the statements are made, if the court, in its discretion, affirmatively finds that the proffered statements were made under circumstances substantially indicating their trustworthiness.

M.R.E. 803(4).

We have what appears to be evidence which would be admissible under Rule 803(4). In light of the fact that Bunyard did not file a brief, we consider that to be tantamount to a confession of error on this point. Ursini should have been allowed to prove that she was disabled and that she could not work by the admittance of these medical records.

Ursini next argues that the chancellor was in error in finding her in contempt of court. It is well established that the determination of whether a party is in contempt of court is left to the chancellor's discretion. *Cumberland v. Cumberland*, 564 So. 2d 839, 845 (Miss. 1990). However, clear and convincing proof is required. *Cumberland*, 564 So. 2d at 845.

The inability to pay child support is a defense to a judgment of contempt. *Riser v. Peterson*, 566 So. 2d 210, 211 (Miss. 1990). When a person is not able to pay child support, the proper action to take is to promptly file for a modification of support. When a modification of support is filed, "a finding of

contempt is not proper." *Shelton v. Shelton*, 653 So. 2d 283, 286 (Miss. 1995); *see Cumberland*, 564 So. 2d at 847; *Thurman v. Thurman*, 559 So. 2d 1014, 1016-17 (Miss. 1990).

Ursini did what she was supposed to do. Ursini filed for a modification of child support payments on May 24, 1994. This was before Bunyard filed for contempt in July. "[Ursini] did what this Court has stated [she] must do in order not to be found in contempt of the divorce decree." *Id.* Even though we consider this issue under our abuse of discretion standard, the failure to reply to the issue is tantamount to a confession of error. Therefore, we find that it was error for the chancellor to find Ursini in contempt of court. Because it was error in finding Ursini in contempt of court, it was also error to award attorney fees. *See Setser v. Piazza*, 644 So. 2d 1211, 1216 (Miss. 1994).

We reverse the chancellor's order of contempt and award of attorney fees and remand this case back for a hearing to determine whether there was a material change in circumstances which would require a modification of child support. We find that it was error for the chancellor to refuse to allow Ursini to present evidence which would show her medical disability and substantiate her claim.

THE JUDGMENT OF THE MADISON COUNTY CHANCERY COURT OF CONTEMPT AND AWARD OF ATTORNEY FEES IS REVERSED AND REMANDED FOR A NEW HEARING. COSTS ARE TAXED TO THE APPELLEE.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.