

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 28, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-0757
STATE OF WISCONSIN**

Cir. Ct. No. 87-FA-779

**IN COURT OF APPEALS
DISTRICT II**

**TIMOTHY C. DEWERFF,
PETITIONER-APPELLANT,**

v.

**CYNTHIA M. DEWERFF,
RESPONDENT-RESPONDENT,**

**STATE OF WISCONSIN,
RESPONDENT.**

APPEAL from an order of the circuit court for Waukesha County:
MARIANNE E. BECKER, Judge. *Affirmed.*

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Timothy C. DeWerff appeals from the order of the circuit court which found him liable for child support arrearages. The issue on

appeal is whether the State is equitably estopped from collecting the arrearages. Because we conclude that equitable estoppel does not apply, we affirm the order of the circuit court.

¶2 Timothy DeWerff and Cynthia M. DeWerff were divorced in April 1989. The findings of fact and conclusions of law in the judgment of divorce were not filed until June 1992. The judgment set Timothy's child support obligations at 31% of his income starting from October 13, 1989. This amount was reduced in 1999 to 29%, in 2000 to 25%, and finally in 2001 to \$400 per month.

¶3 In 1999, the State brought an Order to Show Cause to collect arrearages from Timothy. The court ordered an audit. The audit was from October 13, 1989, the date set by the circuit court for Timothy to begin paying 31% of his income. Timothy objected to the amount found by the audit and the audit was recalculated. Eventually, an audit determined that Timothy owed Cynthia \$22,479.14 in arrearages, \$27,116.14 in interest, and the State was owed \$75.¹ Timothy does not dispute the calculation of the amount of arrearages and interest. Timothy again objected to the determination and the court ordered a hearing where both parties could present arguments. Timothy argued that equitable estoppel should apply and that he should not have to pay the arrearages and interest. He argued that he had been advised by various sources over the years that he either did not owe arrearages or he owed a lesser amount. Because of this, he asserted, the State should be estopped from seeking to collect this amount from him. The court rejected his argument and found that equitable estoppel did not apply.

¹ This amount was again updated in August 2001 for a total of slightly over \$50,000.

¶4 On appeal, Timothy once again argues that equitable estoppel should be applied. The question of whether the doctrine of equitable estoppel applies is a question of law which we review without deference to the decision of the trial court. *Harms v. Harms*, 174 Wis. 2d 780, 784, 498 N.W.2d 229 (1993). Equitable estoppel may apply in child support proceedings. *Id.* The doctrine requires a showing of three elements: “(1) [a]ction or inaction which induces, (2) reliance by another, (3) to his [or her] detriment.” *Id.* at 785.

¶5 Timothy first argues that the judgment initially entered by the circuit court found that there were no arrearages as of the date of that judgment, June 23, 1992. Timothy relies in part on a 1991 order from the court which found that there were no arrearages due at that time. The judgment of divorce entered afterwards in June 1992, however, made the finding that there were no arrearages as of October 13, 1989. Timothy also relies on the fact that he received an order from a family court commissioner that said he owed \$1,144.52 in April 1992. This notice, however, also cautioned Timothy that “[t]o accurately compute the above arrearage calculation, gross wages are needed from 11/16/89 to present.”

¶6 To the extent Timothy relied on other people’s statements that he did not owe arrearages, these people were not the people with the ultimate authority on the subject. Timothy clearly was interested in the amount of arrearages he owed. He should have obtained a decision from the entity responsible for making that determination—the circuit court. As the State argues, had Timothy supplied the State with proof of his income and requested an audit, he would have received a more accurate statement of the amount owed. Since he did not provide the State with proof of his income, and the notice he received from the State clearly stated that the amount shown was not accurate without that information, it was not reasonable for him to rely on that notice as being the total amount he owed.

¶7 Moreover, Timothy was the person with the most complete knowledge regarding his income and finances. He was the one in the best position to know or determine whether 31% of his gross income was being paid as child support. It appears that when he was employed, his employer was withholding the wrong amount. Timothy, however, was in the best position to determine whether the amount being withheld was correct. And when Timothy was self-employed, he was the only one in a position to make that determination. He now attempts to visit the error in calculation on Cynthia.

¶8 Further, Timothy's estoppel argument is directed against the State. Under WIS. STAT. § 767.075 (2001-02),² the State is a real party in interest. The State is pursuing the case, however, because Cynthia applied for services under WIS. STAT. § 49.22. Cynthia and the children, therefore, are the real parties in interest for purposes of collecting the money. Since the actions on which Timothy claims he relied were all actions of the State, estoppel cannot be used to prevent Cynthia from collecting the money she is owed.

¶9 Even if the estoppel argument is properly directed against the State, Timothy would need to establish conduct by the State of such character as to constitute fraud. *Libby, McNeill & Libby v. Dep't of Taxation*, 260 Wis. 551, 558-59, 51 N.W.2d 796 (1952). Fraud in this context is synonymous with unconscionable or inequitable conduct. *Id.* Given the State's notice to Timothy that it needed his gross wages to accurately compute the arrearages, and given that Timothy was the one in the best position to know whether the proper percentage of

² All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

his income was being paid to Cynthia, Timothy would not be able to establish conduct amounting to fraud by the State.

¶10 Further, lack of diligence on the part of a party claiming estoppel is fatal to an estoppel claim. *Foellmi v. Smith*, 15 Wis. 2d 274, 286, 112 N.W.2d 712 (1961). Timothy's conduct in failing to seek an accurate statement of his arrearages by providing his gross wages to the State shows a lack of diligence which would defeat an estoppel claim. For the reasons stated, we affirm the order of the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

