

**NOTICE**

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2017 IL App (4th) 160720-U

NO. 4-16-0720

**FILED**  
May 19, 2017  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

In re: MARRIAGE OF	)	Appeal from
SALLY KAY HUNDLEY,	)	Circuit Court of
Petitioner-Appellant,	)	Sangamon County
and	)	No. 15D234
JOHN J. HUNDLEY,	)	
Respondent,	)	
and	)	Honorable
BUCKHART SAND & GRAVEL CO., INC.,	)	Jennifer M. Ascher,
Third-Party Respondent-Appellee.	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.  
Justices Holder White and Appleton concur in the judgment.

**ORDER**

¶ 1 *Held:* The trial court erred by finding that a third-party respondent did not have a duty to comply with an income withholding order for maintenance deductions under the Income Withholding for Support Act (750 ILCS 28/35 (West 2014)) even though respondent was not yet obligated in the underlying order of support to make maintenance payments to petitioner.

¶ 2 In November 2015, the trial court entered a judgment of dissolution of marriage, ordering respondent, John J. Hundley, to pay \$370 per month in maintenance to petitioner, Sally Kay Hundley, upon the auction of their farmland in Rochester, Illinois. Although an auction was held that same month, the sale of the Rochester property did not occur until September 2016. Meanwhile, in December 2015, Sally had served an income withholding order (withholding order), pursuant to section 25 of the Income Withholding for Support Act (Support Act) (750 ILCS 28/25 (West 2014)), on John's employer and third-party respondent, Buckhart Sand & Gravel

Company, Inc. (Buckhart). Buckhart did not make payments in accordance with the withholding order until June 2016.

¶ 3 In May 2016, Sally alleged in a third-party complaint that Buckhart knowingly failed to comply with the Support Act by not making payments pursuant to the withholding order. In July 2016, Sally filed a motion for summary judgment under section 2-1005 of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-1005 (West 2014)), and Buckhart responded by filing a motion to dismiss under section 2-619 of the Civil Code (735 ILCS 5/2-619 (West 2014)). In September 2016, the trial court granted Buckhart's motion to dismiss, finding that because the sale of the Rochester property had yet to occur, the withholding order was invalid and did not require Buckhart's compliance. For the reasons that follow, we reverse the trial court's judgment and remand for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 In May 1989, the parties were married. In April 2015, Sally filed a petition for dissolution of marriage from John in Sangamon County. At that time, Sally worked as a call center agent and John worked for Buckhart as a heavy equipment operator. In August 2015, Sally and John drafted a marital settlement agreement, pursuant to the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/502 (West 2014)), in which John agreed to pay Sally maintenance, subject to the following condition precedent:

"On and after the first day of the month next following the sale of the parties' farm real estate located at rural Rochester, Illinois, and the distribution of the proceeds of the sale thereof as otherwise set forth herein, husband shall pay to wife the sum of \$370.00 each month."

The marital settlement agreement provided further that the parties' 35 acres of Rochester farm real estate "shall be sold with reserve at public auction." According to the parties' property apportionment schedule, John was to receive estimated proceeds of \$500,000 from the auction. In November 2015, the trial court entered a judgment of dissolution of marriage, which incorporated Sally's and John's marital settlement agreement.

¶ 6 Later in November 2015, the Rochester property sold at public auction for \$325,000, which was significantly less than the parties expected. In addition, the sale of the property was delayed and did not occur as planned under the judgment of dissolution of marriage.

¶ 7 In December 2015, Sally served Buckhart notice by certified mail with a withholding order for \$370 per month beginning on January 1, 2016. In February 2016—after not receiving a payment on the withholding order—Sally sent a notice, reminding Buckhart of its obligation to comply with the withholding order and the statutory penalties for its knowing failure to do so. The record shows that since January 1, 2016, Buckhart had been making the withholdings but had not released them to the Illinois State Disbursement Unit (Disbursement). Buckhart did not respond to Sally's notice and continued to make deductions from John's paycheck without releasing them to Disbursement.

¶ 8 In May 2016, Sally filed a third-party complaint against Buckhart, alleging Buckhart knowingly failed to comply with the withholding order in violation of section 35 of the Support Act (750 ILCS 28/35 (West 2014)). In June 2016, Buckhart released the withholdings at issue to Disbursement, and shortly thereafter, Disbursement released those funds to Sally.

¶ 9 In July 2016, Sally filed a motion for summary judgment seeking statutory penalties under section 50 of the Support Act (750 ILCS 28/50 (West 2014)). Buckhart responded by

filing a section 2-619 motion to dismiss, arguing that the withholding order was invalid and did not require Buckhart's compliance. Buckhart argued further that John's maintenance obligation under the judgment of dissolution of marriage had not yet started pursuant to the condition precedent of selling the Rochester property.

¶ 10 In September 2016, the trial court (1) granted Buckhart's section 2-619 motion to dismiss and (2) found that Sally was not entitled to enforce penalties or the withholding order under the Support Act. Specifically, the court ruled, as follows:

"The court finds that the penalty provisions contained in Section 35 of the [Support] Act do not apply to Buckhart for two reasons. First, Buckhart was not yet a 'payor' as defined by the Act [(750 ILCS 28/15(g) (West 2014))]. Second, there was not a current support owed at the time of the issuance of the Notice to Withhold Income for Support or at the time of issuance of the Notice of non-receipt."

According to the trial court, "[t]he [Support] Act defines 'payor' as any payor of income to an obligor. 750 ILCS 2[8]/15(g) [(West 2014)]." Based on this finding, the trial court explained that Buckhart could not be considered a "payor" under the Support Act because, until the sale of the Rochester property, John was not yet considered an "obligor" under the Support Act (750 ILCS 28/15(e) (West 2014)). Also in September 2016, the Rochester property was sold. In October 2016, Sally filed a notice of appeal from the trial court's decision granting Buckhart's motion to dismiss.

¶ 11

## II. ANALYSIS

¶ 12 Sally argues that the trial court erred in its interpretation of the Support Act, which imposes a mandatory obligation on Buckhart to deduct and transfer income to Disburse-

ment. Specifically, Sally contends that the Support Act "provides neither the right nor the obligation to a payor to determine whether the terms and conditions of [a withholding order] conform to the provisions as stated in an underlying order imposing an obligation of support." Thus, our narrow review concerns whether Buckhart was required to comply with the withholding order served by Sally, even though the condition precedent triggering John's maintenance obligation in the underlying order of support had not yet occurred.

¶ 13 "On appeal from a section 2-619 motion, the reviewing court must determine 'whether there is a genuine issue of material fact and whether defendant is entitled to judgment as a matter of law.'" *Stark Excavating, Inc. v. Carter Construction Services, Inc.* 2012 IL App (4th) 110357, ¶ 36, 967 N.E.2d 465 (quoting *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 494, 639 N.E.2d 1282, 1294 (1994)). "The court must construe the pleadings and supporting documents in favor of the nonmoving party." *Id.* We review the trial court's grant of Buckhart's section 2-619 motion *de novo*. See *id.*

¶ 14 In response to Sally's claim of error, Buckhart counters that Sally did not attach a copy of the judgment of dissolution of marriage and, therefore, failed to strictly comply with the Support Act, in accordance with *Schultz v. Performance Lighting, Inc.*, 2013 IL App (2d) 120405, ¶ 17, 984 N.E.2d 569, *aff'd*, 2013 IL 115738, 999 N.E.2d 331. Buckhart claims that, according to guidance from both the Illinois Department of Healthcare and Family Services and the United States Department of Health and Human Services, an underlying support order must be attached to a withholding order, citing *Illinois Employer Handbook for Child Support 5*, Illinois Department of Healthcare and Family Services, *available at* <https://www.illinois.gov/hfs/ChildSupport/Documents/IIEmployerHandbook.pdf>, and *Income Withholding - Answers to Employers' Questions*, United States Department of Health and Human

Services, (Sept. 20, 2016), <https://www.acf.hhs.gov/css/resource/income-withholding-answers-to-employers-questions#iwo-11>. Buckhart further argues that holding otherwise "would provide divorce attorneys with unilateral power to impose inaccurate garnishment orders on employers and subsequently impose significant penalties when inaccurate, invalid [withholding orders] are not followed." We disagree for the following reasons.

¶ 15 We first note that *Schultz* is distinguishable from this case in that the third-party respondent in *Schultz* alleged invalid notice and not that the underlying order of support itself was invalid. *Schultz*, 2013 IL 115738, ¶ 7, 999 N.E.2d 331. The third-party respondents in *Schultz* alleged a defect apparent on the face of the withholding order through a section 2-615 motion to dismiss (735 ILCS 5/2-615 (West 2014)), in that the withholding order failed to include the social security number of the obligor, as required in the Support Act (750 ILCS 28/20(a)(3) (West 2014)). *Schultz*, 2013 IL 115738, ¶ 7, 999 N.E.2d 331. In *Schultz*, the supreme court held that the withholding order was invalid because the language in the Support Act "unequivocally requires that the obligor's social security number be included in the notice of withholding." *Id.* ¶ 15.

¶ 16 However, the Support Act does not require an underlying order of support to be attached to a withholding order. The Support Act states, "The income withholding notice shall \*\*\* be in the standard format prescribed by the federal Department of Health and Human Services." 750 ILCS 28/20(c)(1) (West 2014). The Support Act does enumerate certain requirements for a valid withholding order, including the "Social Security number of the obligor." 750 ILCS 28/20(c) (West 2014). When construing a statute, "[a] court must consider the entire statute and interpret each of its relevant parts together. If legislative intent can be ascertained from the statute's plain language, that intent must prevail without resort to other interpretive aids." *Bal-*

*moral Racing Club, Inc. v. Topinka*, 334 Ill. App. 3d 454, 458-59, 778 N.E.2d 239, 243 (2002) (citing *Paris v. Feder*, 179 Ill. 2d 173, 177, 688 N.E.2d 137, 139 (1997)). In light of the various requirements listed for a valid withholding order, if the legislature intended to require the attachment of an underlying order of support, it could have expressly done so in the language of the Support Act. See *Department of Central Management Services v. Illinois Labor Relations Board*, 2015 IL App (4th) 131022, ¶ 26, 30 N.E.3d 1183. Thus, unlike in *Schultz*, the failure to attach the underlying order of support did not render the withholding order facially deficient.

¶ 17 We similarly find that the language of the Support Act suggests the legislature did *not* intend to allow for a third-party respondent to contest the validity of an order of support underlying a withholding order. "The fundamental rule of statutory construction is to ascertain and give effect to the legislature's intent." *Schultz*, 2013 IL 115738, ¶ 12, 999 N.E.2d 331. "The best indicator of legislative intent is the statutory language itself, given its plain and ordinary meaning." *Id.* We review a statute in its entirety, while simultaneously taking into account its subject matter and what the legislature intended. *Id.*

¶ 18 The Support Act states, "It *shall* be the duty of any payor who has been served with an income withholding notice to deduct and pay over income as provided in this Section." (Emphasis added.) 750 ILCS 28/35(a) (West 2014). The statute also states, "The income withholding notice *shall* continue to be binding upon the payor until service of an amended income withholding notice or any order of the court or notice entered or provided for under this Section." (Emphasis added.) 750 ILCS 28/40(g) (West 2014).

¶ 19 The use of "shall" in the above-quoted passages from the Support Act indicates the legislature intended for mandatory compliance with a properly served withholding order. See *In re Marriage of Self*, 265 Ill. App. 3d 804, 805, 638 N.E.2d 699, 700 (1994) ("Under the rules

for statutory construction, the word 'shall' ordinarily connotes a mandatory obligation, unless the context of the statute indicates otherwise." ). The language of the Support Act does not allow a third-party respondent served with a valid withholding order to contest the validity of an underlying order of support. Therefore, we disagree with the trial court's reasoning that Buckhart is not a "payor" under the statute, given our reading that the Support Act imposes a mandatory obligation to comply with a properly served withholding order.

¶ 20 In concluding, we commend the court for its written order. Even though we ultimately disagreed with the trial court's analysis, we found its well-written order helpful in resolving this case.

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we reverse the trial court's judgment and remand for further proceedings.

¶ 23 Reversed; cause remanded.