Exit 31. The plaintiff's vehicle had its lights on and was using its four-way flashers. As the defendant's tractor/trailer was approaching the plaintiff's tractor/trailer from the rear, a passenger vehicle was passing both tractor/trailer units. The defendant's unit was not able to slow down, and unable to change lanes due to the presence of the passenger vehicle. The front of the defendant's unit made contact with the left-rear of the plaintiff's trailer and cargo unit, thus providing the impetus of this lawsuit.

It is generally accepted that the violation of a statute may be prima facie evidence of negligence which may be accepted or rejected according to all of the evidence. *Prosser and Keeton on Torts* §36, at 230 (5th ed. 1984). In the present case, the defendant has violated at least two provisions of the Vehicle Code. 75 Pa. Con. Stat. Ann §§3361, 4305 (Purdon 1977). Section 4305 mandates that the operator of a vehicle shall "exercise extraordinary care in approaching . . . a vehicle displaying vehicular hazard warning signals [four-way flashers]." The plaintiff's vehicle was displaying four-way flashers when the defendant's vehicle approached from the rear and made contact with the plaintiff's vehicle. Section 3361 charges all drivers to operate their vehicle in a manner so that the vehicle may be stopped within the "assured clear distance ahead." The defendant's vehicle was not able to come to a stop before making contact with the plaintiff's vehicle. Through trial testimony, the plaintiff has made a prima facie showing of the defendant's negligence.

A case dealing with another winter-time accident is *Kralik v. Cromwell,* 435, Pa. 613, 258 A. 2d 654(1969). The court in *Kralik* held that once the plaintiff had established a prima facie case of negligence the burden was upon the defendant to come forward with credible evidence to exculpate himself from blame. *Id.* at 618, 258 A.2d at 657. Any evidence brought forward by the defendant would be considered with all the other evidence by the fact-finder in determining the question of negligence. In the present case, the defendant has not produced exculpatory evidence.

The defendant also asks the court to find that the plaintiff's operator was contributorily negligent. The court declines to do so. The defendant alleges that in the testimony of the plaintiff's operator, the operator has indicated that he acted in a careless manner by the very act of driving on the highway. However, the defendant has not mentioned by what standard the actions of the plaintiff's operator are to be judged contributorily negligent. The restatement provides that the standard of conduct to which

plaintiff's operator must conform is "that of a reasonable man under like circumstances." *Restatement (Second) of Torts,* §464 (1965). Prosser informs us that "[a]ll courts now hold that the burden of pleading and proof of the contributory negligence of the plaintiff is on the defendant." *Prosser and Keeton, supra,* §65, at 451. The defendant in the instant case has not shown that by electing to remain on the highway and proceed with caution, the plaintiff's operator acted differently than "a reasonable man under like circumstances."

Based upon the foregoing discussion, the defendant's motion for post-trial relief is hereby denied.

ORDER OF COURT

October 20, 1987, the defendant's motion for post-trial relief is denied.

BUSHEY v. BUSHEY, C.P. Adams County, No. DR 502-86, File No. 4311

Support - Voluntary Retirement

1. Each parent has an equal burden to support their child in accord with their earning capacities.

2. Where father does not present any medical evidence that he cannot perform his job or seek a less strenuous assignment from his employer, his retirement is deemed voluntary.

3. Where father stated from a long period prior to divorce that he intended to retire after twenty-five years of service, he may not rely on these statements to justify his reduced income.

William G. Baughman, Esquire, Attorney for Plaintiff
Clayton R. Wilcox, Esquire, Attorney for Defendant

KAYE, J.*, December 3, 1987:

OPINION AND ORDER

This matter came before the Court on November 2, 1987 on

*The Honorable William H. Kaye, Judge, 39th Judicial District of Pennsylvania, specially presiding. - Ed. Note

cross-petitions of the parties to modify an existing order of support for the parties' minor child, Joseph Edward Bushey, born August 25, 1971. The factural background leading to this proceeding is as follows:

On December 23, 1980, Nancy Jean Bushey ("Mother") and Joseph F.X. Bushey ("Father") entered into a post-nuptial agreement which included, *inter al.*, a provision that Father would pay to mother $25.00 per week for the support of their child. However, the agreement expressly did not preclude the mother from seeking an additional amount of support through the Support Law if experience established that this sum proved insufficient. In November, 1986, Mother filed a support complaint in this Court, and a support conference was held by the Domestic Relations Office conference officer on January 7, 1987, at which time the parties stipulated to entry of an order which provided for the following:

1. that Father would pay to Mother $172.00 every two weeks for their son's support; and
2. that their post-nuptial agreement would be modified to strike two provisions there-from, i.e. the section dealing with child support and asecond section dealing with "present obligations".

This stipulated order was confirmed by the Court by its order dated January 8, 1987.

Thereafter, on February 18, 1987, Father voluntarily retired from his employment by the Commonwealth of Pennsylvania as an officer with the Pennsylvania State Police. On May 19, 1987, Father executed a petition to modify the support order referred to above on the basis of his reduction in income arising from his retirement. On June 10, 1987, Mother filed a petition to modify the support order referred to above on the basis that the child's bills were increasing due to the child's becoming older. The petitions were consolidated for a support conference scheduled for July 20, 1987. Due to the complexity of the issues involved, on September 4, 1987 the matter was referred to Court by the hearing officer for determination. The undersigned was designated to preside specially at the hearing which was fixed for November 2, 1987.

Counsel have now submitted memoranda to the Court on the issues they perceive dispositive, and the matter is ripe for resolution.

Initially, it is well to note the general principles regarding modification of an existing support order:

> A support order may be modified only when the evidence produced at a hearing established a substantial change in circumstances.
>
> The well-settled principles governing requests for modification of support orders are as follows: First that the parent seeking to modify a support order bears the burden of demonstrating such a change of circumstances as will justify a modification; second, that only material and substanitial changes in circumstances, as proven by competent evidence, will warrant modification of a support order; and third, that a modification may only be based upon facts appearing in the record which show such permanent change in circumstances as to require such modification.
>
> *Jaskiewicz v. Jaskiewicz,*
> 325 Pa. Super. 507, _____,
> 473 A.2d 183, 184 (1984),
> [citations omitted].

The parties herein both have sought to modify an order entered by the Court on January 8, 1987, and the petitioner in each instance has the burden of establishing the existence of changes warranting modification. *Com. ex rel. Tokach v. Tokach,* 326 Pa. Super. 359, 474 A.2d 41 (1984). Thus, each petition must be considered individually.

Mother's petition alleges nothing more than that the child for whom support is sought is older and his expenses are therefore increasing. The increases in expenses amount to a $260.00 annual increase in auto insurance due to the son's obtaining a driver's license, and an increase in tuition at Delone Catholic High School, where the son is a student, from $650.00 annually in 1986-87 to $725.00 in 1987-88.[1] Thus, the annual increase in expenses is $355.00, or the equivalent of $6.44 per week. However, during the same period, the Mother will have received a pay increase in her position of State Health Nurse with the Commonwealth of Pennsylvania, in an annual amount of $2,400.00, effective April 1, 1987. Thus, while Mother's expenses have increased marginally, her gross income has increased by the equivalent of $46.15 per week. Even with deductions for taxes, Mother's income increase is significantly more than the increase in

[1]The amount the mother actually pays is indicated. A subsidy is provided to pay the difference between the sum paid and the total tuition charged.

expenses which she demonstrated. The net effect is that she has failed to meet her burden of proof as set forth in *Tokach, supra.*

The position taken by the Father's petition to modify is that he has reduced earnings, and that he is entitled to a reduction in the support obligation. There is no question that Father's income has been reduced since entry of the existing order of support. As a State Trooper, he had a net income which was the equivalent of $1,904.25 per month, while his pension is $1,031.69 per month, and his income from six part-time jobs[2] has thus far been nominal.

Mother contends that although Father's income is in fact reduced, his earning capacity is not, pointing out that his retirement was voluntary, not mandatory. Father responds by saying that he retired from the police force after twenty-five years and ten days of service, and that this had been his plan for many years prior to the parties' divorce. We note that Mother did not contradict this testimony. Additionally, Father testified that his last assignment with the State Police was to weigh trucks in a three-county area, and that he had experienced health-related problems arising from the performance of his duties. Additionally, he was told by his physician not to participate in physical fitness programs at the State Police Barracks. From his testimony, we conclude that Father, at age 51, found it increasingly difficult to comply with the demands of his employment, and opted for a retirement at a time in his career which he had many years earlier determined would be a proper time for retirement.

> It has been held that a parent may not intentionally reduce his or her earnings and then use the reduction in earnings to obtain a reduction in the amount of support which that parent must provide for his or her children; courts have traditionally viewed with suspicion any sudden reduction of payments toward support based upon such income reductions. [Citations omitted]. The rationale underlying these decisions is that a parent has a duty to his or her children and therefore a parent should not be permitted to evade that responsibility by deliberately reducing his or her income. This rule, however, is not without its exceptions. . .
>
> *Roberts v. Bockin,* 315 Pa. Super. 52, _____,
> 461 A.2d 630, 632 (1983).

In the instant case, Father obviously decided, somewhat precipitously, within six weeks after his support obligation had been

[2]He is a Special Deputy Sheriff, assists at a funeral home, mows grass at a cemetery, drives a truck, works as a tipstaff for this Court, and cuts and sells firewood.

increased rather dramatically, to retire from his employment. While he pointed to the fact that this had been his plan for many years, other circumstances - most notably the parties' divorce - had intervened, and thus significantly altered the parties' economic circumstances. It is entirely possible that at the same time Father had for the first time proclaimed his intention to retire after twenty-five years of service, Mother also anticipated that she would not be employed outside the home, but the parties' subsequent circumstances dictated otherwise. Each parent has an equal burden to support their child in accordance not only with their actual earnings, but also with their respective earning capacities. *Conway v. Dana,* 456 Pa. 536, 318 A.2d 324 (1974). See also *Com. ex rel. Wasiolek v. Wasiolek,* 251 Pa. Super. 108, 380 A.2d 400 (1977). Although Father has implied that he experienced infections as a consequence of his employment, and that this was a factor in his decision to retire, he presented no medical evidence to show the extent of this alleged difficulty, nor that he had sought a different assignment from his employer that he might find less of a burden to perform. We conclude that the retirement decision was totally voluntary, and the reduction in income which defendant experienced is a consequence solely of this voluntary election on defendant's part.

Based on the foregoing rationale, we find that Father's earning capacity continues at the same level as it was prior to terminating his full-time employment, i.e. $502.86 per week, as found by the Domestic Relations hearing officer, and that his necessary expenses are the same as at the time of entry of the existing order.

At the same time, Mother's *net* income has increased by approximately $30.00 per week, and her expenses have increased by $6.44 per week, resulting in an increase in net funds available to Mother of approximately $25.56. As her net income at the time of the January 7, 1987 support conference was found to be $293.45, it is now $317.01.

Accordingly, we will enter an order directing Father to pay Mother the sum of $80.00 per week in child support.

ORDER OF COURT

NOW, December 3, 1987, Joseph F.X. Bushey, defendant, is directed to pay the sum of $80.00 per week to Nancy Jean Bushey, plaintiff, for the support of their minor child, Joseph Edward Bushey, born August 25, 1971, effective April 1, 1987. In all other respects, the Order of Court entered in this case on January 8, 1987 shall remain in full force and effect.