Affirmed and Memorandum Opinion filed July 23, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00733-CV

IN THE INTEREST OF B.E.W, A MINOR CHILD

On Appeal from the 310th District Court
Harris County, Texas
Trial Court Cause No. 1986-09032

MEMORANDUM OPINION

Appellant Dennis Ware appeals from the trial court's judgment awarding appellee Peggy Moran $322,923.40 in child support arrears. In four issues, appellant contends this court should reverse the order awarding arrears. We affirm.

I. BACKGROUND

Appellant and appellee were divorced in New Mexico in 1973. They had one child of the marriage. The New Mexico decree ordered that appellant pay child support in the amount of $75.00 to appellee on a monthly basis. The parties

later moved to Texas. In 1975, appellee requested an increase in child support in Walker County, Texas, the county that the parties resided in at that time. The court increased the support obligation to $150.00 a month. The case was later transferred to Harris County. In 1987, appellee again requested an increase in child support. The court increased appellant's monthly child support obligation to $350.00. The child turned eighteen in July 1989.

In 2016, appellee filed a Notice of Child Support Lien and a Notice of Judicial Writ of Withholding alleging that appellant owed past-due child support. In response, appellant filed special exceptions and a Motion to Stay Issuance and Delivery of Judicial Writ of Withholding and Motion to Dismiss. Appellee then requested that the trial court "make a determination of the arrearages pursuant to Texas Family Code §§ 157.323 and/or 158.309."

Prior to trial, the trial court conducted a hearing on appellant's motion to dismiss based on appellant's judicial admission and judicial estoppel arguments. Appellee objected to the evidence being presented to the court because appellant failed to supplement his disclosures to reflect that judicial estoppel and judicial admission were defenses that he was asserting. The trial court overruled appellee's objection and considered the evidence for purposes of the motion to dismiss. During the hearing, appellant offered a letter from the District Clerk of Walker County. Appellee objected to the letter as hearsay, and the trial court sustained the objection. Appellant did not offer any exception to the hearsay rule at that time or later, did not specify the purpose for which the evidence was being offered, and did not indicate why the evidence was admissible. The record further indicates that this letter was never offered as evidence during trial. The trial court denied the motion to dismiss, and the case proceeded to trial the same day.

During trial, appellee presented evidence of the amounts owed under the

original decree and various modifications, in addition to interest calculations on such amounts. Appellee introduced the payment records from the various counties in which the case had been pending previously. The records reflected some payments made, which appellee acknowledged receiving. In her calculation for arrears and interest, appellee provided a credit for all payments she acknowledged receiving. Appellee indicated that she consented to the child living with appellant for one semester of school in the child's seventh grade year, approximately three to four months, but denied that the child resided with appellant the entire seventh grade year.

Appellant testified that he fully paid the amounts ordered. Appellant did not present any bank records, receipts, or other documentary evidence to show any payments made. Appellant indicated that he paid child support directly to appellee in either cash or money order. Appellant admitted that there were times when he fell behind in his child support payments, but that he caught up by paying appellee directly. Appellant testified that he did not make the payments through the child support registry because he "didn't know who to pay it to." Appellant also acknowledged that he had made some support payments to the registries in Walker County, Texas, and Harris County, Texas.

Appellant testified that during the child's seventh grade year and again during the child's senior year of high school, the child came to live with appellant. During the child's seventh grade year, appellant did not know how much he had spent on the child in support. During the child's senior year, appellant thought that appellant spent a "couple hundred dollars" on the child and bought him a new pickup truck. The truck cost about $14,000. Appellant also paid for the child's gas, insurance, food, clothing, and athletic fees during that year, but appellant did not testify as to how much any of those items cost. Appellant was not certain

whether the child had appellee's permission to live with appellant or whether appellee had consented to the child moving in with appellant. Appellee acknowledged this living situation but denied that she gave her consent.

The child, an adult at the time of the trial, testified that he lived with appellant for a year between May 1983 to May 1984, during his seventh-grade year of school. He stated that appellee gave him the choice to live with her or with appellant. The child indicated that he lived with appellant again during his senior year of high school but that he did not have appellee's permission to do so. The child remembered giving appellee child support payments on behalf of appellant for approximately four years. He stated that he would hand the payments to appellee when he returned from visiting appellant, but he could not recall the amount of the payments or how many payments were handled in this fashion.

Other witnesses for appellant testified that they witnessed payments to appellee. None of the witnesses could recall how much was paid, how frequently such amounts were paid, or when such amounts were paid. Appellee testified that she had not received any direct payments from appellant or any third party on appellant's behalf.

The trial court rendered a judgment for arrearages in the full amount requested by appellee but awarded appellant a credit in the amount of $4,452.00. There were no findings of fact or conclusions of law filed, and the judgment did not detail either how the credit was calculated or the purpose for giving it. Appellant filed a motion for new trial, asserting that the trial court erred in excluding evidence and in not finding that the doctrines of judicial estoppel and judicial admission barred the judgment. The trial court held a hearing and denied appellant's motion.

II. MOTION FOR NEW TRIAL

In appellant's first issue, he contends that "the trial court abused its discretion in denying his motion for new trial." Appellant's first contention is that the trial court abused its discretion in excluding and admitting certain evidence. Next appellant complains that because the trial court "ignored" testimony and failed to account for certain offsets, the judgment is "manifestly too large."

A. Exclusion and Admission of Evidence

Appellant argues that the trial court erred by excluding (1) a letter from the District Clerk of Walker County; (2) appellant's testimony regarding direct payments of child support to appellee; and (3) "testimony relating to appellant's judicial estoppel defense."[1] Lastly, appellant asserts that the trial court erred in admitting appellee's exhibit twelve.

1. Applicable Law

We review a trial court's denial of a motion for new trial for an abuse of discretion. *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 926 (Tex. 2009). Evidentiary rulings are committed to the sound discretion of the trial court. *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 132 (Tex. 2012). A trial court abuses its discretion when it acts without regard to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc*., 701 S.W.2d 238, 241–42 (Tex. 1985); *Mitchell v. Bank of Am., N.A.*, 156 S.W.3d 622, 626 (Tex. App.—Dallas 2004, pet. denied). To warrant reversal on an evidentiary challenge, appellant must show that the exclusion or inclusion of the challenged evidence probably

[1] Appellant raises four issues in his brief. In issue three, he asserts that the trial court erred in excluding testimony related to appellant's judicial estoppel defense. Because appellant's third issue and first issue are reviewed under the same standard, we combine them to address each efficiently.

caused the rendition of an improper judgment. *See* Tex. R. App. P. 44.1(a); *see also Reliance Steel & Aluminum Co. v. Sevcik*, 267 S.W.3d 867, 873 (Tex. 2008) (in determining whether harm was caused by admission or exclusion of evidence, courts look to the role evidence played in context of trial and whether evidence was "crucial to a key issue").

To preserve error in the exclusion of evidence, a party must (1) attempt to introduce the evidence during the evidentiary portion of the trial; (2) if an objection is lodged, specify the purpose for which the evidence is offered and give the trial court reasons the evidence is admissible; (3) obtain a ruling from the court; and (4) if the court rules the evidence inadmissible, make a record of the evidence the party sought to have admitted. *Comiskey v. FH Partners, LLC*, 373 S.W.3d 620, 629–30 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); *Tex. Prop. & Cas. Guar. Ass'n v. Nat'l Am. Ins. Co.*, 208 S.W.3d 523, 546 (Tex. App.—Austin 2006, no pet.); *see also Ulogo v. Villanueva*, 177 S.W.3d 496, 501 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (holding failure to introduce evidence at evidentiary portion of trial and to obtain an adverse ruling prevented error preservation for excluded evidence). The party seeking admission of evidence must inform the court of the substance of the evidence by an offer of proof unless the substance is apparent from the context. *See* Tex. R. Evid. 103(a)(2); *Garden Ridge, L.P. v. Clear Lake Ctr., L.P.*, 504 S.W.3d 428, 438 (Tex. App.—Houston [14th Dist.] 2016, no pet.). The purpose of an offer of proof is to enable a reviewing court to determine whether the exclusion of the evidence was erroneous or harmful. *Garden Ridge*, 504 S.W.3d at 439. A party does not make an offer of proof if the party fails to show what questions counsel intended to ask and how the witness would have responded. *Id*. Without knowing what the witness would have said, the appellate court cannot determine whether the trial court's exclusion probably

caused the rendition of an improper judgment and the basis for reversible error. *Id*.

2. Analysis

Appellant's first complaint is that the trial court erred in excluding the Walker County letter. At the pre-trial dismissal hearing, appellee objected to the letter as hearsay. Appellant did not offer any exception to the hearsay rule at that time or later, did not specify the purpose for which the evidence was being offered, and did not indicate why the evidence was admissible. *See Comiskey*, 373 S.W.3d at 629–30. The record further indicates that the letter was never offered as evidence during the trial. *See id*. As a result, no error on this point has been preserved. *See id*.; *Ulogo*, 177 S.W.3d at 501.

Appellant next argues that the trial court "incorrectly sustained the objections . . . when appellant tried to admit evidence of direct payments of child support to Appellee." However, appellant fails to cite to any portion of the record to show whether appellant: (1) offered the evidence during the evidentiary portion of trial; (2) specified the purpose for which the evidence was offered and why the evidence was admissible; (3) obtained a ruling; and (4) made a record of the evidence appellant wanted admitted. *See Comiskey*, 373 S.W.3d at 629–30. Because appellant did not identify the evidence that he claims was excluded in his brief, it is unclear what evidence was allegedly excluded by the trial court and how the evidence excluded probably caused the rendition of an improper judgment. *See* Tex. R. App. P. 44.1(a); *see also Waldrip*, 380 S.W.3d at 132.

At trial, appellant testified that he had made payments directly to appellee for child support. Appellee testified that she had not received any direct payments from appellant or any third party on behalf of appellant. Additional witnesses testified that at various times they had paid appellee on appellant's behalf for his child support obligation. None of the witnesses could recall how much was paid,

how frequently such amounts were paid, or when such amounts were paid. Appellant has not pointed to specific portions of the record to show what evidence he offered and was excluded that he now complains of on appeal, what role any such evidence would have played in context of trial, and how this specific evidence was "crucial to a key issue." *See Sevcik*, 267 S.W.3d at 873. Our own review of the record has not revealed any such evidence either. As a result, no error on this point has been preserved. *See Comiskey*, 373 S.W.3d at 629–30; *Ulogo*, 177 S.W.3d at 501.

Appellant contends that the admission of appellee's exhibit twelve, a letter from the court clerk in New Mexico regarding appellant's child support payment history to that county, was erroneous because it had no "probative value." When appellee offered exhibit twelve at trial, appellant objected on the basis of hearsay and "to renew our judicial estoppel claim." To preserve error, a complaint must be made to the trial court by timely objection that states the grounds for the ruling sought with sufficient specificity to make the trial court aware of the complaint, comply with the applicable rules, and be ruled on by the trial court. Tex. R. App. P. 33.1. Appellant failed to object to the document's relevance or "probative value" which is the ground on which he bases his appellate complaint. Any error on this point has not been preserved.

Appellant next argues that the "trial court erred in excluding testimony relating to appellant's judicial estoppel defense." Appellant argued and attempted to show that appellee had sought various increases in child support but had never brought an action to enforce any of appellant's alleged missed child support payments. A review of the trial record reveals that the trial court sustained one objection that appellant argued supported his judicial estoppel defense. During cross-examination of appellee at trial, appellant's trial counsel asked the following:

Q. When you filed in 1975, you filed a motion to increase Mr. Ware's child support payments from $75 to a hundred and fifty dollars; is that correct?

A. Yes.

Q. And nowhere in the application that you filed did you give any indication to the Court that Mr. Ware was not current on his child support payments; is that correct?

MS. FRITSCH: Judge, I'm going to object to the relevance with regard to that being an issue that's not set forth in the disclosure.

MS. DUCKERS: Again, this goes to the judicial estoppel argument; and it's also circumstantial evidence of payment that she filed multiple papers over the years asking for increases in support without ever bringing forth to any judicial officer that there was any delinquency in support.

THE COURT: Sustained.

. . . .

Q. (By Ms. Duckers) In 1975 in Walker County, you filed a complaint against Mr. Ware for failure to pay child support; is that correct?

A. Yes.

Q. And did you pursue that complaint further in Walker County?

A. Yes.

Q. Did you get a ruling in Walker County in 1975 for failure -- for his alleged failure to pay child support?

A. In 1975 all I have is those payments that were listed, period.

Q. That wasn't my question, Ms. Moran. My question was: Did you pursue your complaint in Walker County for Mr. Ware's alleged failure to pay child support?

A. I did not file against him at that point in time, but it was brought up in a trial that he had failed to pay child support.

Q. And did you obtain an order that stated that he failed to pay child support in Walker County?

A. I can't recall.

Later during the trial, appellant requested further clarification regarding the

trial court's ruling on appellant's ability to present his defenses of judicial admission and estoppel. The trial court indicated that it would rule on the evidence as it was presented, consider the objections at that time and any further argument on the ruling made. The record contains no indication that any evidence was presented and excluded on appellant's judicial estoppel defense and appellant points to none. On direct examination, appellant testified that he recalled that appellee had filed a complaint against him for back child support in 1975 and that as a result they had a custody dispute over the child.

In response to the trial court's ruling on the contested evidence in the above exchange, appellant did not make an offer of proof of the evidence that he expected to be elicited from appellee's response. *See Sw. Country Enterprises, Inc. v. Lucky Lady Oil Co.*, 991 S.W.2d 490, 493–94 (Tex. App.—Fort Worth 1999, pet. denied) (appellant failed to preserve any error of trial court's exclusion of all of appellant's fact witnesses and evidence because appellant failed to make an offer of proof). Appellant explained that the reason that he was asking the question was to show that appellee had filed multiple requests for increases in support, but never sought to obtain the back child support until now—more than thirty years after the child had turned eighteen. However, after the trial court sustained the objection, appellant elicited testimony from appellee that she *had* sought back child support from the trial court in 1975 and at that trial the issue was raised. The record does not reveal what further excluded evidence appellant tried to elicit to support his judicial estoppel defense. Thus, appellant has failed to preserve any error for review. *See id.*

Even if the alleged error had been preserved and the trial court abused its discretion in excluding the answer, appellant has failed to demonstrate how the exclusion of the answer to the question probably caused the rendition of an

improper judgment. *See* Tex. R. App. P. 44.1(a); *see also Rawson v. Oxea Corp.*, 557 S.W.3d 17, 24 (Tex. App.—Houston [1st Dist.] 2016, pet. dism'd) ("[A]ppellant must show the erroneously excluded evidence was controlling on a material issue dispositive of the case, the evidence was not cumulative, and its absence resulted in an improper judgment."). "Generally, errors relating to the admission or exclusion of evidence will not entitle an appellant to reversal unless the appellant can show the entire case turns on the complained of evidence. *Rawson*, 557 S.W.3d at 24. Appellant makes no argument to show that the exclusion of the answer to a single question at trial probably caused the rendition of an improper judgment in this case, how the evidence was controlling on a material issue, or how it was not cumulative of other evidence admitted at other points during the trial. *See id*. The trial court admitted appellant's requested exhibits, the Motion for Contempt and the Motion to Modify, to show appellee had sought increases in child support and filed other pleadings at various times without allegedly ever requesting any then-outstanding child support payments. Appellant further elicited testimony, through both appellee and appellant, regarding appellee's alleged failure to seek the outstanding child support obligations at an earlier time. Under the circumstances presented herein, we cannot say that the exclusions of the answer to this question probably caused the rendition of an improper judgment. *See id*.

Appellant failed to preserve error because he did not make an offer of proof of the excluded testimony. Even if error were preserved, appellant has failed to show how the exclusion probably caused the rendition of an improper judgment.

We overrule appellant's issue one, sub-points one through three, and issue three.

B. Amount of the Judgment

In his last sub-point to his first issue, appellant argues that the trial court "ignored the testimony" of four witnesses regarding the child support payments made to appellee. Appellant argues that the trial court further erred by not allowing an $1,800 offset as well as any related interest because the child lived with appellant for an entire year while the child was in seventh grade. Appellant also contends that the trial court erred in not deducting $2,025 plus any accrued interest because appellant testified that he fully paid the child support obligations ordered by the New Mexico court.[2] Pointing to the cumulative effect of these alleged errors, appellant argues that the failure to account for these payments and offsets resulted in a judgment that is "manifestly too large."

1. Applicable Law

A trial court's decision to grant or deny the relief requested in a motion for enforcement is reviewed for an abuse of discretion. *Chenault v. Banks*, 296 S.W.3d 186, 189 (Tex. App.—Houston [14th Dist.] 2009, no pet.). When, as here, the trial court did not file findings of fact and conclusions of law, we imply all findings necessary to support the judgment and will uphold those findings if sufficient evidence supports them. *Id*. Under the abuse of discretion standard, sufficiency of the evidence is not an independent ground of error but rather is a relevant factor in assessing whether the trial court abused its discretion. *Id*. In a bench trial, the trial court is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Beck v. Walker*, 154 S.W.3d 895, 901 (Tex. App.—Dallas 2005, no pet.). Generally, when a fact finder is presented with conflicting evidence, the fact finder may believe one witness and disbelieve others.

[2] This argument is raised in appellant's fourth issue, but because it raises the same type of issue as appellant's fourth sub-point to issue one, we will address it here.

Id.

The trial court's discretion is very limited when it comes to calculating child support arrearages. *Chenault*, 296 S.W.3d at 189. "In a proceeding to confirm child support arrearages, the trial court's child support calculations must be based on the payment evidence presented, not the trial court's assessment of what is fair or reasonable." *Id.* at 190, *quoted with approval in Ochsner v. Ochsner*, 517 S.W.3d 717, 727 (Tex. 2016). Although the court can award certain offsets and credits, the trial court has no discretion to forgive or decrease a past child support obligation. *Chenault*, 296 S.W.3d at 189. "As with child support arrearages, the trial court also has no discretion to modify, forgive, or make equitable adjustments in awarding interest on child support arrearages." *Id.* at 190. Awarding interest on child support arrearages is mandatory, and the trial court has no discretion to not award the full amount of interest due. *Id*. at 193.

"An obligor may plead as an affirmative defense in whole or in part to a motion for enforcement of child support that the obligee voluntarily relinquished to the obligor actual possession and control of a child." Tex. Fam. Code § 157.008(a). The obligor must prove that the obligee affirmatively agreed to relinquish possession and control of the child to the obligor. *See* Tex. Fam. Code § 157.008(a); *Chenault*, 296 S.W.3d at 191; *Leighton v. Court*, 773 S.W.2d 63, 64 (Tex. App.—Houston [14th Dist.] 1989, no writ). Voluntary relinquishment must have been in excess of court-ordered possession and access periods, and the obligor must have provided actual support. Tex. Fam. Code § 157.008(b); *In re A.M.*, 192 S.W.3d 570, 575–76 (Tex. 2006) (noting disagreement regarding proof needed to show actual support); *Gonzales v. Tippet*, 167 S.W.3d 536, 541 (Tex. App.—Austin 2005, no pet.). The obligor has the burden of proof on voluntary relinquishment. *Beck*, 154 S.W.3d at 903. If the obligor proves the voluntary

relinquishment defense, the obligor is entitled to either an offset or reimbursement of the child support obligation, depending on whether the obligor continued to pay child support during the period of voluntary relinquishment. *See In re A.M.*, 192 S.W.3d at 574.

2. Analysis

Appellant first argues that the trial court "ignored" the payment testimony of appellant and his witnesses. Appellant also argues that the trial court erred in not deducting $2,025.00 plus any accrued interest because appellant testified that he paid all child support ordered by the New Mexico court. As the fact finder, when presented with conflicting evidence, the trial court is generally permitted to believe one witness and disbelieve others. *See Beck*, 154 S.W.3d at 901. Appellee's evidence established that some payments had been made through the different registries and appellee testified that no other payments had been made. Appellant's evidence of payment did not provide any amounts paid or dates of payment except in very general terms. Neither appellant nor his witnesses could remember any specifics of the payments allegedly made. Appellee introduced the payment records from the various counties in which the case had been pending previously. The records reflected some payments made, which appellee acknowledged receiving. In her calculation for arrears and interest, appellee provided a credit for all payments shown in the payment records. Appellee testified that aside from those payments received through the child support registries, she did not receive any direct payments from appellant or other third party on his behalf. Under the circumstances, the trial court was within its discretion to believe appellee's evidence and disbelieve appellant's evidence.

Appellant next argues that the trial court should have provided a further offset of $1,800 plus interest for the year that the child lived with him while the

child was in seventh grade. There was contested evidence of the length of time that appellee voluntarily relinquished the child. Appellee agreed that she voluntarily relinquished the child, but only for a semester of school or "three to four months." When asked whether appellant had an "idea" of how much he spent per month on the child during this period, appellant responded, "I don't know." Appellant failed to adduce evidence as to any actual support that he provided the child during this period.[3] No testimony was elicited from appellee about whether she did or did not provide any actual support to the child during this period. Because the evidence on the length of time that the child stayed with appellant with appellee's permission was conflicting, and there was no evidence of any actual support provided by appellant during the child's seventh grade year, appellant's entitlement to an offset during this period was not established as a matter of law, nor was the trial court's ruling against the great weight and preponderance of the evidence. *See Pedregon v. Sanchez*, 234 S.W.3d 90, 95–96 (Tex. App.—El Paso 2007, no pet.) ("Because [father] did not present any evidence as to the amount of support he actually provided, the trial court did not err in denying an offset."); *Gonzales*, 167 S.W.3d at 545 ("Even assuming that [father] conclusively proved voluntary relinquishment, the court could have reasonably determined that he did not prove actual support and rejected his affirmative defense."); *see also In re A.M.*, 192 S.W.3d at 575–76 ("In this case, it was undisputed that [father] solely supported his son and daughter . . . during the two relevant periods of excess possession. [Mother] admitted as much at the hearing, testifying that she provided no support . . . nor was there evidence of support from anyone else during the relevant periods.").

[3] This evidence stands in contrast to appellant's later testimony about the actual support provided to the child during the child's senior year of high school. During that period while the child lived with appellant, appellant purchased the child a truck and paid for insurance, gas, clothing, food, and athletic fees.

We conclude that the trial court did not abuse its discretion, and we overrule appellant's fourth sub-point to his first issue, as well as his second sub-point to his fourth issue.

C. Conclusion

Having overruled all of appellant's sub-points within issue one, we overrule appellant's first issue. Having concluded that appellant did not preserve any error with regard to the exclusion of testimony related to appellant's judicial estoppel defense and also failed to show how the exclusion probably caused the rendition of an improper judgment, we overrule appellant's third issue.

III. JUDICIAL ADMISSION

In his second issue, appellant asserts that appellee judicially admitted in prior proceedings that appellant was not delinquent in his child support obligation. This argument centers around two pleadings filed by appellee and a transcript of an Oral Rendition of Court's Judgment in 1987, in connection with an earlier proceeding in the case.

A. Applicable Law

A judicial admission occurs when a party makes a statement of fact which conclusively disproves a right of recovery or defense. *In re Estate of Guerrero*, 465 S.W.3d 693, 705 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). "This rule is based on the public policy that it would be unjust to permit a party to recover after he has sworn himself out of court by a clear, unequivocal statement." *Id*. "The elements required for a judicial admission are: (1) a statement made during the course of a judicial proceeding; (2) that is contrary to an essential fact or defense asserted *by the person making the admission*; (3) that is deliberate, clear, and unequivocal; (4) that, if given conclusive effect, would be consistent with

public policy; and (5) that is not destructive of the opposing party's theory of recovery." *Id*. at 705–06 (emphasis added); *see also Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001) (where pleading alleged specific accrual date, such date was judicial admission); *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 905 (Tex. 1999) (judicial admission "occurs when an assertion of fact is conclusively established in the live pleading, making the introduction of other pleadings or evidence unnecessary"); *Regency Advantage Ltd. P'ship v. Bingo Idea-Watauga, Inc.*, 936 S.W.2d 275, 278 (Tex. 1996) (per curiam) (petition which stated lessee had tendered full-performance of obligations under the lease, including leasehold improvements and equipment was not a judicial admission that lessee was obligated to buildout the leased space when taken in context of entire petition); *Maldonado v. Maldonado*, 556 S.W.3d 407, 415–16 (Tex. App.—Houston [1st Dist.] 2018, no pet.) ("We therefore reject [husband's] suggestion that at the same time [wife] was litigating the issue of whether [the business] was her separate property, isolated statements taken out of tangential filings were judicial admissions against her own litigation position.").

B. Analysis

Two of the purported judicial admissions are contained in prior pleadings filed by appellee in 1980 and 1986. In one pleading, a Motion for Contempt, appellee states that appellant has failed to pay child support for the months of June, July, and August 1980. In the second pleading, a Motion to Modify, appellant states that appellee "did not allege that Appellant had not fully paid his child support from May 1973 through May 1980 or any other time period prior to February 1987." There is no statement in the Motion to Modify regarding payment or non-payment of child support.

Appellant argues that because appellee failed to mention any other months

or delinquencies when she filed the Motion for Contempt and the Motion to Modify, she judicially admitted that the unmentioned payments were made. We disagree. Appellee did not state that appellant's child support obligation had been paid for those other months, and the other months are not mentioned in the pleadings at all. Appellee could have chosen not to mention other non-payments for various reasons; the failure to mention other instances of non-payment does not establish there were no such instances. Instead of being a clear, deliberate, and unequivocal statement of fact, it is the absence of such a statement. *See Huff v. Harrell*, 941 S.W.2d 230, 239 (Tex. App.—Corpus Christi 1996, writ. denied) ("To be considered an admission or inconsistent statement, there must be a statement. The pleadings at issue contain no statements regarding an oral guarantee that contradict any part of Mr. Huff's testimony.").

The next purported judicial admission is the Oral Rendition of the Court's Judgment in 1987. This evidence was never offered at trial in support of appellant's defense. Appellant never offered the transcript and never requested that the trial court take judicial notice of the transcript at trial.[4] However, even if we were to consider the Oral Rendition of the Court's Judgment, there is no statement made by appellee or appellee's attorney. *See In re Estate of Guerrero*, 465 S.W.3d at 705 (statement must be one contrary to an essential fact or defense asserted by the person making the admission); *Tex. Tax Sols., LLC v. City of El Paso*, 593 S.W.3d 903, 910 (Tex. App.—El Paso 2019, no pet.) ("[C]lear, undeliberate, unequivocal declarations in open court by a party's attorney may also constitute judicial admissions binding on the party."). The only statement made was that of the judge then presiding over the dispute. Appellant argues that appellee failed to object to the judge's statement at that time and, thus, admitted

[4] The Oral Rendition of the Court's Judgment is in the clerk's record as an exhibit to appellant's Motion to Dismiss.

the judge's statement as true. As noted above, instead of being a clear, deliberate, and unequivocal statement of fact, this is the absence of any statement by appellee. Appellant has failed to point to any authority which suggests that a statement made by a judge in a proceeding can operate as a judicial admission against a party.

Because appellant has failed to point to a clear, deliberate, and unequivocal statement of fact made by appellee, we overrule appellant's second issue.

IV. JUDGMENT UNDER FAMILY CODE SECTION 157.323

In his fourth issue, appellant argues that the order rendering judgment is statutorily defective because it fails to meet the requirements of section 157.263 of the Family Code. Appellee argues that she did not seek or request relief under section 157.263, but instead sought relief under section 157.323.

A. Applicable Law

Section 157.323(c) states that "if arrearages are owed by the obligor, the court shall: (1) render judgment against the obligor for the amount due, plus costs and reasonable attorney's fees." Tex. Fam. Code § 157.323(c)(1). Whereas, section 157.263 states that the court shall confirm the amount of arrearages and render one cumulative money judgment. *Id*. § 157.263(a). "A cumulative money judgment includes: (1) unpaid child support not previously confirmed; (2) the balance owed on previously confirmed arrearages or lump sum or retroactive support judgments; (3) interest on the arrearages; and (4) a statement that it is a cumulative judgment." *Id*. § 157.263(b).

B. Analysis

Appellee filed a notice of child support lien and an application for judicial writ of withholding. Appellant responded by filing special exceptions and a motion to stay the issuance of the judicial writ of withholding. In response,

appellee requested that the trial court determine the amount of the arrearages under sections 157.323 and 158.309 of the Texas Family Code.

The trial court's final judgment states that after applying the offset credit, appellant's "child support arrearages are $322,923.50 as of August 23, 2017. . . . [appellee] is granted and rendered a judgment for child support arrearages, including accrued interest, against [appellant] . . . such judgment bearing interest at 6 percent simple interest per year."

There is no indication that appellee sought relief under section 157.263, but instead requested relief under 157.323. The judgment granted is consistent with the relief authorized by section 157.323. Therefore, the trial court did not err in granting a judgment pursuant to the relief requested by appellee.

We overrule appellant's fourth issue.

V. CONCLUSION

Having overruled all of appellant's issues, we affirm the trial court's judgment.

/s/ Ken Wise
Justice

Panel consists of Chief Justice Frost and Justices Wise and Hassan.