UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2155

September Term, 2015

RANDALL B. ROE

v.

MARY LOU ROE

Leahy,
Beachley,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: January 24, 2017

Randall Roe ("Randall") appeals from a judgment of the Circuit Court for Montgomery County denying his request to reduce or terminate his alimony obligation to his former wife, Mary Lou Roe ("Mary Lou"). Randall presents four issues on appeal, which we have slightly reworded:

1. Did the trial court err in denying Randall's Motion to Modify and Terminate Alimony?

2. Did the trial court err in awarding Mary Lou alimony arrearages of $134,500?

3. Did the trial court err in awarding Mary Lou attorneys' fees of $50,000 and expert witness fees of $13,060?

4. Did the trial court err in denying Randall's motion for continuance?

Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On February 24, 2006, the Circuit Court for Montgomery County (Hon. Katherine D. Savage) issued a written opinion which granted the parties an absolute divorce and, relevant to this case, awarded Mary Lou indefinite alimony of $8,000 per month. In her thirty-two page opinion, Judge Savage addressed each of the factors enumerated in Section 11-106(b) of the Family Law Article. Md. Code (1984, 2012 Repl. Vol.) § 11-106 of the Family Law Article ("FL"). As to Mary Lou's ability to be self-supporting, Judge Savage determined that Mary Lou would not "become even partly self-supporting." She found that Randall's net after-tax earnings at that time were $21,300 per month, or $255,600 per year. After analyzing his monthly expenses, Judge Savage concluded that Randall had "between $7,900 and $12,300" per month available to pay alimony. In determining the

amount of alimony, Judge Savage noted that she was "relying on [Randall's] monthly income from his Burns & Roe employment only."

In September 2014, Randall filed a Motion to Modify and Terminate Alimony. His principal contention was that his loss of employment with Burns & Roe required a modification of alimony. He bolstered his argument for modification by alleging that "it is clear from the factual findings that [Judge Savage] based the alimony award solely on the parties' respective incomes . . . and their reasonable living expenses at that time." Randall also unilaterally reduced his alimony payments to $2,500 per month.

In addition to opposing Randall's Motion to Modify and Terminate Alimony, Mary Lou sought to enforce Judge Savage's alimony award by filing a petition for contempt. She also filed a motion to increase the 2006 alimony award.

A trial was originally set for January 30, 2015, but was postponed at the joint request of the parties so that they could pursue mediation. The trial was rescheduled for October 22, 2015. On September 25, 2015, Alec M. Lewis, Esquire, entered his appearance on behalf of Randall as co-counsel with Walter W. Johnson, Jr., Esquire. On October 1, 2015, Mr. Lewis moved for a continuance of the October 22, 2015 trial, which Mary Lou opposed. The circuit court denied Randall's motion for continuance.

Trial proceeded on October 22, 2015. Randall was the only witness called to testify. The thrust of Randall's argument for a reduction in alimony was that his employment with Burns & Roe terminated on July 1, 2014, and that he was using inherited assets to pay his expenses, including alimony. At the conclusion of Randall's testimony – which was the

entirety of his case – Mary Lou moved for judgment. The circuit court granted Mary Lou's motion, denying Randall's request to either terminate or reduce alimony. The circuit court found Randall in contempt and established alimony arrearages of $134,500. The court also ordered Randall to pay Mary Lou $50,000 as a contribution to her attorneys' fees and $13,060 in expert witness fees.[1] Randall timely noted this appeal.

STANDARD OF REVIEW

Pursuant to Maryland Rule 8-131(c), "[w]hen an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Further, "[w]e will not disturb an alimony determination 'unless the trial court's judgment is clearly wrong or an arbitrary use of discretion.'" *Ridgeway v. Ridgeway*, 171 Md. App. 373, 383-84 (2006) (quoting *Blaine v. Blaine*, 97 Md. App. 689, 698 (1993), *aff'd*, 336 Md. 49 (1994)). The circuit court's "decision on the question of modification . . . is left to the sound discretion" of the circuit court. *Cole v. Cole*, 44 Md. App. 435, 439 (1979).

In this case, the circuit court granted Mary Lou's motion for judgment at the close of Randall's case. "We review a trial court's grant of a motion for judgment under the same analysis used by the trial court." *Barrett v. Nwaba*, 165 Md. App. 281, 290 (2005).

[1] The circuit court also denied Mary Lou's request for an increase in alimony. Mary Lou did not appeal that determination.

Accordingly, "we assume the truth of all credible evidence on the issue, and all fairly debatable inferences therefrom, in the light most favorable to the party against whom the motion is made." *Id*. (citing *Moore v. Myers*, 161 Md. App. 349, 362 (2005)).

DISCUSSION

I. The Denial of Randall's Motion to Modify and Terminate Alimony

Section 11-107(b) of the Family Law Article governs modification of alimony and provides that "[s]ubject to § 8-103 of this article and on the petition of either party, the court may modify the amount of alimony awarded as circumstances and justice require." "A party requesting modification of an alimony award must demonstrate . . . that the facts and circumstances of the case justify the court exercising its discretion to grant the requested modification." *Ridgeway, supra*, at 384. In *Ridgeway*, we held that an alimony award may be modified upon a showing of a material change in circumstances. *Id.*

In the present case, Randall argues that he demonstrated a material change in circumstances which mandated a reduction in alimony. He asserts that Judge Savage determined that his net income from Burns & Roe in 2006 was $255,600 per year, but that his income at the time of the modification hearing in 2015 was only $10,492 per month, or $125,904 per year. In *Lott v. Lott*, 17 Md. App. 440, 446-47 (1973), we recognized that a substantial change in the financial condition of either party is a common ground for seeking modification. A substantial increase or decrease in a party's income is an important factor for consideration by the court. *Id.* at 447. We noted, "[w]hat amounts to a substantial change in the husband's financial circumstances is a matter to be determined in the sound

discretion of the chancellor for which there are no fixed formulas or statutory mandate." *Id*.

Here, the trial court properly granted Mary Lou's motion for judgment on Randall's Motion to Modify and Terminate Alimony. The trial court recognized that Randall had lost his income from Burns & Roe, but properly noted that a reduction in income does not automatically require a modification of alimony. In its analysis, the circuit court focused on Randall's lavish lifestyle and substantial assets. The trial judge noted that Randall has "continued a lifestyle of a king for the last several years, and I'm assuming the same lifestyle he had when he was in front of Judge Savage [in 2006]." Specifically, the court found that Randall continued to maintain memberships in multiple country clubs and spent $6,000 to $8,000 per year on his croquet court. The court concluded that Randall has the "same lifestyle that he had before." Although Randall asserted in his verified financial statement that his monthly income was $10,492, he acknowledged during cross-examination by Mary Lou that a trust provided him with an additional $11,000 per month. The circuit court's determination that Randall was able to maintain a lavish lifestyle is supported by the evidence that his income was $21,492 per month, or $257,904 per year. Indeed, Randall's income in 2015 is not materially different from the $255,600 per year he earned in 2006.

The trial court also examined Randall's assets both at the time of the initial award in 2006 and at the time of trial. The trial judge determined that Randall's net worth had actually increased since 2006, from $6,279,399 to $7,146,200. The trial court also noted

that Randall had $1,500,000 in cash.[2] The trial court concluded that Randall had not met his burden under FL § 11-107(b) to demonstrate that "circumstances and justice" required a reduction in alimony. Viewing the evidence in a light most favorable to Randall, we hold that the trial court did not abuse its discretion in denying Randall's request to reduce his alimony obligation.[3]

Randall also sought to terminate alimony pursuant to FL § 11-108(3), arguing that termination was necessary to avoid a harsh and inequitable result. It logically follows that, if the trial court did not err in denying Randall's request for a reduction in alimony, it likewise did not err in denying his request to terminate alimony.

Before proceeding, we pause momentarily to address Randall's "law of the case" argument. Specifically, Randall asserts that Judge Savage's statement in her written opinion in 2006 that she was "relying on [Randall's] monthly income from his Burns & Roe employment only" constitutes the "law of the case," thereby mandating a reduction in alimony. This argument is unpersuasive for several reasons. First, it is improper to assert that one sentence in Judge Savage's lengthy opinion becomes the "law of the case." In her alimony analysis, Judge Savage carefully considered all twelve factors enumerated in FL 11-106(b). Randall's income at Burns & Roe was merely one factor, albeit an important

[2] In his brief, Randall acknowledges $1,800,000 in "liquid assets."

[3] In argument on Mary Lou's motion for judgment, Randall conceded that he did not have any evidence that Mary Lou earned more than $36,000 per year. Randall's counsel also argued that he had evidence that Mary Lou "has almost half a million dollars in assets." However, Randall presented no evidence of Mary Lou's financial circumstances in his case in chief.

one, in Judge Savage's analysis. Second, the "law of the case" doctrine does not apply when a court in a later hearing reviews substantially different evidence. *Cf. Baltimore County v. Fraternal Order of Police*, 449 Md. 713, 730 (2016) (noting that the law of the case doctrine is not applied where "the evidence in a subsequent trial is substantially different from what was before the court in the initial appeal."); *Corby v. McCarthy*, 154 Md. App. 446, 480-81 (2003) (holding that the law of the case doctrine does not apply to reconsideration of the status of a child previously determined to be a destitute adult child because "[t]hose findings are subject to change.").

In this case, the legal standards applicable to modification and termination of alimony are substantially different from the standard applicable to an initial alimony award. Under FL § 11-107(b), the court may modify the amount of alimony "as circumstances and justice require"; under FL § 11-108(3), the court may terminate alimony if necessary "to avoid a harsh and inequitable result." Consequently, the evidence in a modification or termination of alimony case will likely be substantially different from the evidence required under FL § 11-106(b) to determine the duration and amount of an initial alimony award. We conclude that the law of the case doctrine is inapplicable here.

II. The Alimony Arrearages

Having properly denied Randall's motion to terminate or modify alimony, the trial court correctly established alimony arrearages in the amount of $134,500.[4] Indeed, at oral argument Randall conceded that his contention as to the alimony arrearages is predicated on his argument that Mary Lou's alimony should have been modified or terminated, an argument that we have rejected.[5]

III. The Award of Mary Lou's Attorneys' Fees and Expert Witness Fees

Appellant next contends that the circuit court erred in awarding Mary Lou attorneys' fees in the amount of $50,000 and expert witness fees of $13,060. The governing statute in this regard is FL § 11-110(c):

> (c) *Required considerations* – Before ordering the payment, the court shall consider:
> (1) the financial resources and financial needs of both parties; and
> (2) whether there was substantial justification for prosecuting or defending the proceeding.

The court has the discretion to award fees to either party provided that it has considered the factors enumerated in FL § 11-110. *See generally* Cynthia Callahan & Thomas C. Ries, *Fader's Maryland Family Law*, § 15-4 (6th ed. 2016). As we noted in *Fitzzaland v. Zahn*, 218 Md. App. 312, 333 (2014) (quoting *Lieberman v. Lieberman*, 81 Md. App. 575, 600-02 (1990),

[4] In his brief, Randall concedes that he owes Mary Lou $60,500 in alimony arrearages.

[5] Randall did not challenge the trial court's finding of contempt on appeal.

> [I]n determining the appropriate amount of an attorney's fee award, the court should consider "(1) whether the [fee amount awarded] was supported by adequate testimony or records; (2) whether the work was reasonably necessary; (3) whether the fee was reasonable for the work that was done; and (4) how much can reasonably be afforded by each of the parties."

We review the trial court's decision to award a portion of Mary Lou's attorneys' fees against Randall for abuse of discretion. In *Broseus v. Broseus*, 82 Md. App. 183, 200 (1990), we stated:

> The amount of the attorney's fees award is within the discretion of the chancellor. Although that discretion is subject to review by this Court, we will not disturb the award unless that discretion was exercised arbitrarily or the judgment was clearly wrong. *Danziger v. Danziger*, 208 Md. 469, 475, 118 A.2d 653 (1955); *Sody v. Sody*, 32 Md. App. 644, 660, 363 A.2d 568 (1976). The chancellor may make a fee award based upon the record and observations at trial. *Sharp v. Sharp*, 58 Md. App. 386, 406, 473 A.2d 499 (1984).

Randall challenges the trial court's award of attorneys' fees in two respects: (1) that he was "substantially justified in bringing his motion for modification of alimony based on the material change in circumstances that he suffered"; and 2) that the court "conducted no assessment whatsoever of the reasonableness of the fees claimed by [Mary Lou]." As to the first argument, the trial court found that Mary Lou was justified in defending her alimony award because Randall unilaterally reduced his payments to $2,500 per month. The court went on to state, "And I don't find that [Randall] had a legitimate reason to defend the motion to recoup the alimony." The trial court expressly considered whether there was substantial justification for prosecuting or defending the proceeding as required by FL § 11-110(c)(2); it was not clearly erroneous in concluding that Mary Lou's action was substantially justified and that Randall's was not. We note that the trial court also

appropriately considered FL § 11-110(c)(1) when it stated, "With respect to attorneys fees, the Court has to consider financial circumstances of both parties, which I have."

As to the reasonableness of Mary Lou's attorneys' fees, Mary Lou's counsel submitted an affidavit as an exhibit, which was admitted without objection. The affidavit includes a description of each professional service rendered, the corresponding amount of time spent on the activity, and the hourly rate. The fees of Mary Lou's prior counsel were admitted as a separate exhibit. The trial court therefore had sufficient information for it to conclude that Mary Lou's attorneys' fees were reasonable and reasonably necessary. In determining whether attorney's fees should be awarded, the court "may rely upon [its] own knowledge and experience in appraising the value of an attorney's services." *Foster v. Foster*, 33 Md. App. 73, 77 (1976). Here, the trial court relied on its knowledge and experience regarding attorneys fees when it stated, "I don't need the party to come up and say it's fair and reasonable because that's what the Court has to do." We therefore find no error in the trial court's decision to award Mary Lou a portion of her attorneys' fees.

The circuit court also awarded Mary Lou $13,060 in fees she incurred to employ Alan Zipp, a certified public accountant. Randall's principal objection to the circuit court's award of these fees is that Mr. Zipp was not available for a deposition between September 25, 2015, the date Mr. Lewis entered his appearance as co-counsel, and October 22, 2015, the date of trial. The trial court recognized that Mr. Lewis was frustrated by not being able to schedule Mr. Zipp's deposition, but the court noted that Mr. Lewis "got in [the case] kind of late" and, more importantly, Randall's prior counsel had "plenty of time to depose

[Mr. Zipp]." The trial court was therefore unpersuaded by the argument that Mr. Zipp's fees should not be awarded because he was not available for a deposition, particularly when Mr. Zipp did not testify at trial. Mr. Zipp's work and corresponding hours were specifically itemized in an exhibit admitted into evidence. The trial court properly considered the FL § 11-110(c) factors in evaluating Mary Lou's claim for expert fees and, accordingly, did not abuse its discretion.

IV. The Denial of Randall's Motion for Continuance

Finally, Randall asserts that the trial court erred in denying his motion to postpone the October 22, 2015 trial. As previously noted, Mr. Lewis entered his appearance as co-counsel with Walter W. Johnson, Jr. on September 25, 2015, and filed his motion to continue on October 1, 2015. Mr. Lewis sought a continuance because: 1) he needed additional time to schedule Mr. Zipp's deposition; and 2) the parties had not yet engaged in mediation. Mary Lou noted in her opposition to the motion that she needed a prompt resolution of the case because Randall had unilaterally reduced her alimony payments. Mary Lou's counsel also noted that the trial court had cleared the October 22, 2015 trial date with both counsel and that Randall's counsel was dilatory in not scheduling Mr. Zipp's deposition.

The Court of Appeals has held that "the decision to grant a continuance lies within the sound discretion of the trial judge." *Touzeau v. Deffinbaugh*, 394 Md. 654, 669 (2006). The trial court's decision whether to grant or deny a motion for continuance will not be disturbed absent an abuse of discretion. *Id*. "Abuse of discretion" has been defined as

"discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Jenkins v. City of College Park*, 379 Md. 142, 165 (2003).

Here, the first trial date in January, 2015 was postponed to allow the parties to pursue mediation. That the parties failed to mediate is of little consequence to the court, particularly since mediation cannot be compelled. Moreover, the trial court cleared the October 22, 2015 trial date with counsel for both Mary Lou and Randall. As to the assertion by Mr. Lewis that he needed more time to depose Mary Lou's expert, the trial court noted that Randall's co-counsel knew of Mr. Zipp in May, 2015 and had "plenty of time" to depose him prior to trial. We hold that the trial court did not abuse its discretion in denying Randall's motion for continuance.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT