Circuit Court for Talbot County
Case No. 20-D-14-008358

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 43

September Term, 2018

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CURT CONNOLLY

v.

MELISSA CONNOLLY

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Wright, Jr.,
Nazarian,
Sharer, J. Frederick,
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Nazarian, J.

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Filed: June 20, 2019

Melissa Connolly ("Mother") and Curt Connolly ("Father") were married on October 24, 1998. They divorced in 2002, but later reunited and their son, O.C., was born on May 20, 2006. Father moved out of the home in September 2014, and Mother filed for custody and child support that November. The Circuit Court for Talbot County entered an order establishing custody and child support in 2015.

This appeal arises from both parties' efforts, beginning in 2017, to modify child support. It began when Mother sought to modify custody and child support. Father answered and asked the court to modify child support as well. After a hearing, the court found a material change in circumstances from a reduction in Father's income and reduced his child support slightly. On appeal, Father argues that the circuit court abused its discretion by allowing Mother to testify about her income after she failed to respond to Father's discovery requests. He also challenges the trial court's calculation of his actual income. We appreciate Father's frustration about Mother's failure to respond to discovery, but find nevertheless that the court acted within its discretion, and we affirm the judgment.

## I. BACKGROUND

This custody and child support litigation began November 12, 2014, when Mother filed a complaint seeking child support and sole physical custody of O. Father answered and requested joint legal custody but agreed that Mother should have sole physical custody. He also asked the court to establish child support for O "in accordance with the parties' actual net income and the Maryland Child Support Guidelines."

After a hearing in September 2015, a family magistrate issued a report and

recommended that Mother and Father share joint legal custody, that Mother have primary physical custody, and that Father have "reasonable and liberal visitation." The magistrate calculated Father's child support obligation at $758.00 per month, effective October 1, 2015, based on Father's income and business expenses as a self-employed waterman and Mother's income as a senior catering coordinator and after applying the Child Support Guidelines. The circuit court issued an order adopting the magistrate's recommendations.

On March 16, 2017, Mother filed a motion to modify custody and child support. She alleged that Father had "failed and refused to keep [O] in [his] physical care and custody for the overnights on Sundays of his weekend visits," a situation that, she conceded, "was not specifically spelled out in the Order of October 15, 2015, but was included in the calculations for child support and the expenses of child care." She claimed that due to the weekend change in custody, her income had decreased and her child care expenses had increased. She sought a corresponding increase in child support and an order requiring him to keep O until Monday morning during his weekend visits.

In the same motion, Mother alleged Father failed to pay his share of O's child care expenses and that he "informally agreed" to O's "need for orthodontia." She asked the court to issue an order requiring him to contribute to the expenses of O's orthodontia "and all other extraordinary medical expenses in proportion to the relative incomes of the parties."

Father responded by explaining that he needed to be on the water early on Monday mornings:

> [W]hen I was keeping [O] on Sunday nights [O] lived in Claiborne and went to Tilghman Elementary School and since the summer of 2016 [O] moved to Easton and now goes to school in Trappe, Maryland and I am unable to provide transportation from Sherwood to Trappe on a Monday morning.

Father also disputed the amount of Mother's alleged child care expenses, and included copies of the 2016 expense statement from O's day care provider.

The court held a scheduling conference on May 22, 2017 and issued a pre-trial scheduling order with a discovery deadline of August 30, 2017, and set trial for October 25, 2017.

Father served interrogatories and requests for production on Mother. Mother failed to respond, though, and Father filed a motion to compel, which the court denied. But the court noted in its order that Father "may object to any information not provided through discovery" at trial in October. Father filed a motion for reconsideration and the court denied that as well.

The week of trial, Father filed his own motion to revise the child support order. He argued that the order hadn't appropriately considered Father's business depreciation expenses from his 2014 tax return. Citing Maryland Rule 2-535(b), Father asked the court to revise its two-year-old order and allow him to claim O as a dependent for 2017 through 2019 to offset the court's "erroneous treatment." Mother responded that Rule 2-535(b) required Father to prove fraud, irregularity or mistake, and none was present here.

Trial went forward on October 25, 2017. Mother and Father resolved the custody dispute by agreeing that Father would keep O until Monday on summer weekends to

accommodate Mother's work schedule. With respect to Mother's request for "extraordinary medical expenses," Father provided evidence from O's orthodontist that O's suggested orthodontic treatment could begin in "approximately two years," but would not be medically necessary "[a]t this time." In her testimony at trial, Mother was asked whether the orthodontic work was "necessary at this time"? She replied "Not at this time. In about two years."

As to child support, both parties testified, as well as Tina Thompson Hash, the parties' joint tax preparer. Mother testified that from April to November, she worked catering events on Friday through Sunday, and since November 2015, Father had stopped keeping O on Sunday nights. She moved to admit her pay stubs, and Father's counsel objected based on her failure to respond to discovery requests. The court sustained the objections, but allowed Mother to testify that her gross income was $1,846 every two weeks or $38,769.15 that year (as of the date of trial). Over further objection, the court allowed Mother to testify about O's school schedule and child care expenses.

Father contested Mother's assertions, and argued as well that his child support obligation should be decreased because his income had decreased from $5,334 per month to $2,545 since 2015. He attributed much of his decreased income to business expenses, including his work truck and boat, that in his view were undercredited. Mother disputed his calculations and suggested a more accurate figure of Father's income for child support purposes was approximately $3,600 per month.

The trial court issued its order and opinion on December 20, 2017. The court

reiterated the parties' agreement that O would spend every other weekend with his Father from Friday at 5:00 p.m. to Sunday at 6:00 p.m., and that during the summer months those weekends would extend until Monday at 5:00 p.m. The court denied Mother's request to modify child support for extraordinary medical expenses based on the evidence that O's dental work was "cosmetic" and not medically necessary.

The court found that Father's annual 2016 income was $59,543.00 (or $4,962.00 per month) after subtracting $14,430.00 in deductions for "ordinary and necessary business expenses," which included bait, line baiters, fuel for the boat, boat slip rental, and boat maintenance costs. After applying the Maryland Child Support Guidelines, the court ordered Father to pay $699 per month ($59 less than the 2015 order had required) to Mother through the Office of Child Support Administration. The court also ordered that "the parties [] continue to share equally the cost of work-related child care expenses."

On January 2, 2018, Father filed a motion to revise the December 2017 order. He asked the court to find that "[t]he orthodontia requested for the minor child is not medically necessary at this time" and that the court recalculate Father's child support obligations based on a reduced income amount of $2,891.50 per month. Mother answered on January 29, 2018. Father filed a motion to strike Mother's answer.

At a hearing on February 7, 2018, Father argued that he interpreted the "ordinary and necessary expenses" deducted from self-employed parents' income in Family Law Article §§ 12-201(b)(2) and 12-201(l) to exclude "accelerated component of depreciation," but not "straight-line depreciation," and that the trial court had abused its discretion by

failing to deduct the straight-line depreciation value attributable to his work boat and work truck. Mother argued that the trial court had properly considered "a myriad of things" at trial in determining child support. The court stated it would allow the parties an additional ten days to submit case law on the depreciation issue. Nevertheless, on February 8, 2018, the court denied Father's motion to strike and motion to revise order.

Father then filed a motion to vacate the February 8, 2018 order because the court ruled before the ten days had passed. Mother responded that her counsel "understood the Court's comments [at the hearing] to be an invitation to conduct further research *if* a subsequent request for revision of the December 20, 2017 Order was made," which never happened. The court denied Father's motion to vacate on March 6, 2018, and Father filed a timely notice of appeal.[1]

## II. DISCUSSION

On appeal, Father challenges the circuit court's decision not to reduce his child support more than it did, and he takes issue with four separate rulings the court made in the course of reaching that decision.[2] All four are decisions committed to the court's broad

[1] Mother has not participated in the appeal beyond submitting a letter stating her agreement with the trial court's two former orders and indicating that she could not afford appellate counsel.

[2] Father's brief listed five Questions Presented:

> I. Was it an abuse of discretion for the Court to not issue its orders of 8-28-17 and 9-4-2017 in accordance with the dictates of Rule 2-433?
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> II. Was it reversible error of the Court on 10-25-2017 to allow Appellee to testify over objection as to her income and alleged child care expenses when she had failed to provide very basic

discretion, and we discern no abuse of that discretion in any of them.

### A. The Circuit Court Did Not Abuse Its Discretion In Allowing Mother To Testify About Her Income And In Not Imposing Further Discovery Sanctions.

*First*, and citing Maryland Rule 2-433,[3] Father challenges the court's order denying his motion to compel discovery and not imposing discovery sanctions beyond precluding Mother from admitting paystubs at trial. We review trial courts' discovery rulings for abuse of discretion. *Rose v. Rose*, 236 Md. App. 117, 131 (2018). And the court's discretion in this context is broad: we don't reverse unless the ruling is "well removed from any center mark imagined" and "beyond the fringe of . . . minimally acceptable." *Wilson v. John Crane, Inc.*, 385 Md. 185, 123 (2005) (*quoting In re Adoption/Guardianship No. 3598*, 347

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> discovery regarding same?
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> III. Was it reversible error for the court to find in its decision that 'Connolly's 2016 tax form makes no distinction between the Toyota Tundra and the other vehicle, therefore, the car and truck expenses will not be deducted" when in fact the return only lists the Toyota Tundra as a vehicle?
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> IV. Was it reversible error for the court to refuse to allow any depreciation in arriving at Appellant's actual income under Family Law 12-201?
>
> V. It having been established that orthodontia was neither medically necessary or that orthodontia of any sort was even necessary at the time of hearing, was it an abuse of discretion for the court in its memorandum and opinion to merely opine that "orthodontia is not necessary at this time" when in fact it was not medically necessary thereby leaving the impression it would be necessary as a valid expense in the future whether or not it was "medically necessary"?

[3] "[I]f [the trial court] finds a failure of discovery, [it] ***may*** enter such orders in regard to the failure as are just . . . ." Md. Rule 2-433(a) (emphasis added).

Md. 295, 313 (1997). Similarly, decisions to admit evidence and testimony are "left to the sound discretion of the trial court." *Moreland v. State*, 207 Md. App. 563, 568 (2012); Md. Rule 5-104(a) ("Preliminary questions concerning the . . . admissibility of evidence shall be determined by the court . . . ."). "We will not disturb a trial court's evidentiary ruling unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Id.* at 568–69 (cleaned up).

Father was, to be fair, legitimately aggrieved by Mother's failure altogether to respond to his discovery requests. She initiated this round of litigation, and Father's interrogatories and requests for production were reasonable in scope. The court certainly could have granted Father's motion to compel or imposed stiffer sanctions on Mother. Instead, the court nominally denied the motion, but didn't deny him any relief. The court permitted Father to "object to any information not provided through discovery," and at trial the court sustained Father's objections when Mother sought to admit pay stubs that she hadn't produced. Even so, the court did allow Mother to review her pay stubs while she was on the stand and to testify about her income, which leads Father to wonder, understandably, if she suffered any sanction at all.

The context is important, though. The discovery at issue related to the parties' income and expenses, and both sides were asking the court to make a change. The court had the basic information it needed because, as required by Rules 9-202(f) and 9-203(b), Mother and Father submitted pre-trial financial statements disclosing their monthly incomes and any applicable child care expenses. Courts do then need to verify the parties'

income statements with "suitable documentation" of actual income which includes "pay stubs, employer statements . . . and copies of each parent's 3 most recent federal tax returns." Md. Code (1984, 2012 Repl. Vol., 2018 Cum. Supp.), § 12-203(b)(2)(i) of the Family Law Article ("FL"). "In order to establish [] actual income, a party to a child support case could produce any one, two, or all three of the items listed in § 12–203(b)(2)(i)." *Tanis v. Crocker*, 110 Md. App. 559, 572 (1996). The purpose of the missing discovery, then, was to verify the income and expense figures, and to allow the court to resolve any disputes.

Mother's financial statement indicated that her monthly income before taxes was $4,298. At trial, the court permitted Mother to testify that her year-to-date income was $38,769.15 and that her year-to-date bonus was $3,187.50. The court also allowed Father to cross-examine Mother at length. In the end, the court adopted the income figure from Mother's financial statement as her income, and Father doesn't challenge that figure here.

We agree with Father that Mother's discovery (non-)responses violated her obligations under the Maryland Rules, and by failing to respond, she made it difficult for Father to prepare for trial. She also risked far worse sanctions than the court imposed. Nevertheless, we do not find that the court abused its discretion by addressing Mother's conduct as it did. This is a relatively straightforward child support dispute, and the missing information was neither voluminous nor complex. Had Mother's income or circumstances changed from the time of the earlier child support order, her discovery failures would have left Father totally blindsided; because they hadn't, and because Father's arguments in favor of modifying support turned on *his* income and expenses, he ultimately wasn't prejudiced.

Indeed, and despite Mother's discovery conduct, Father succeeded in proving a material change in circumstances justifying a change in child support, and he was able to raise all of his challenges to the then-current award. Under these particular circumstances, the court's discovery decisions fell within its discretion, although we caution Mother not to test these limits if child support disputes arise in the future.

### B. The Circuit Court Did Not Err Or Abuse Its Discretion In Calculating Father's Child Support Obligations.

Before modifying a child custody and support order, the trial court must find first a material change in circumstances since the time of the operative award. *See* FL§ 12-104(a); *Horsley v. Radisi*, 132 Md. App. 1, 21 (2000) ("Once the support award is established, the trial court may only modify child support payments if there is an affirmative showing of a material change in circumstances in the needs of the children or the parents' ability to provide support."). Even without the deductions from income Father challenges here, the court found that Father's income had decreased to the point that there had been a material change in circumstances. He takes issue, though, with the way in which the court calculated his income and, in turn, with the resulting support figure, which he contends is too high.

We review decisions to modify child support for abuse of discretion:

> Whether to grant a modification rests with the sound discretion of the trial court and will not be disturbed unless that discretion was arbitrarily used or the judgment was clearly wrong. When an action has been tried without a jury, we will review the case on both the law and the evidence. We will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and we give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

*Ley v. Forman*, 144 Md. App. 658, 665 (2002) (internal citations omitted). And we review

the trial court's underlying factual findings only for clear error. Md. Rule 8-131(c).

Family Law Article § 12-201(b)(1) defines "actual income" as "income from any source." Because Father is a self-employed waterman, FL § 12-201(b)(2) directed the court to calculate his income by determining his gross receipts and deducting expenses:

> For income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, "actual income" means gross receipts minus ordinary and necessary expenses required to produce income.

The question of what qualified as his "ordinary and necessary expenses" is where the trial court and Father disagree, and specifically whether the court should have deducted expenses for a truck and boat that he had depreciated on his tax return.

FL § 12-201(l) includes ordinary business expenses and depreciated assets in the calculation of income, but not accelerated depreciation that might be allowed on tax returns:

> 'Ordinary and necessary expenses' ***does not include*** amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses or investment tax credits or ***any*** other ***business expenses determined by the court to be inappropriate for determining actual income for purposes of calculating child support***.

(Emphasis added). In applying this provision to Father's submissions, the court deducted $14,430 in ordinary and necessary expenses from his 2016 income, including the costs associated with his costs for bait, fuel, slip rental, and boat maintenance. The court did not include additional expenses Father claimed for a boat and a truck because "[Father] testified that he had owned the same boat and Toyota Tundra at the time of the last order[,]"

meaning the prior child support order, and because Father hadn't distinguished in his filings between his work truck and another vehicle he owned.

Father's position is that FL § 12-201(l) required the trial court to make deductions from his income based on a straight-line depreciation value of his boat and Toyota Tundra. But although Father's argument tracks the law, the trial court's decision flows more from its findings of fact, and the court didn't agree that he had established the expenses he now disputes were required to produce his income.

It is true that the "straight-line depreciation method"[4] and "accelerated depreciation"[5] are not the same. And it is also true, as Father argues, that FL § 12-201(l) does not mention "straight-line depreciation"—it only excludes "amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses" from the definition of "ordinary and necessary expenses." Because, Father argues, the statute doesn't explicitly *exclude* "straight-line depreciation" the way it excludes "accelerated component of depreciation," the trial court was required to include "straight-line depreciation" among his "ordinary and necessary expenses."

That's all true as far as it goes, but it doesn't solve Father's problem, which is that

[4] Straight-line depreciation is "[a] depreciation method that writes off the cost or other basis of the asset by deducting the expected salvage value from the initial cost of the capital asset, and dividing the difference by the asset's estimated useful life." Depreciation Method, *Black's Law Dictionary* (10th ed. 2014).

[5] Accelerated depreciation is a "[d]epreciation recorded using a method that writes off the cost of an asset more rapidly than the straight-line method." Depreciation, *Black's Law Dictionary* (10th ed. 2014).

the court didn't think that he had proven his expenses were tied to his work. The remaining language of FL § 12-201(l) acknowledges the court's broad discretion to determine what does and does not qualify as a business expense. Not only must the court exclude accelerated depreciation, but "[o]rdinary and necessary expenses' does not include . . . any [] business expenses determined by the court to be *inappropriate* for determining actual income . . . ." FL § 12-201(l) (emphasis added). With regard to Father's truck and boat, the court found that Father's 2016 tax return hadn't distinguished which of his vehicles he used for work, and therefore that the depreciation expense shown on that tax return wasn't adequately tied to Father's business. To the extent that the order states that "[f]or purposes of calculating [Father'] income, . . . it is inappropriate to include depreciation, as depreciation is a tax deduction permitted by the Internal Revenue Code for the purpose of benefitting the individual taxpayer, not the child," we understand the court to be saying that Father can't reduce his income with tax depreciation beyond the ordinary and necessary business expenses he could prove. So in the end, Father's argument fails not because he wasn't entitled to reflect depreciation expense in his income, but because the court didn't agree that he had proven those expenses were tied to his business.

### C. The Circuit Court Did Not Err Or Abuse Its Discretion When It Found O's Orthodontia Was Not Necessary At The Time Of The Hearing.

*Finally*, although everybody appears to agree with the circuit court's denial of Mother's request for orthodontia expenses, Father takes issue with the specific language the court used in its finding and rationale. Specifically, Father appears to argue that even

though the court found "[O] d[id] not need orthodontic treatment at this time," meaning at the time of trial, the court should have gone on to conclude more broadly that O's orthodontia did not qualify as a "necessary" medical expense under FL § 12-204(h)(2)[6] and FL § 12-201(g)(2).[7]

We decline the invitation to opine on O's future orthodontic needs. Based on the orthodontist's letter (submitted as an exhibit by Father and cited in the trial court's opinion), everyone agreed that the orthodontic care proposed for O was not medically necessary at the time of trial. But that was the extent of the record on this point—the parties didn't attempt to prove, and the court had no record on which to find, whether O will need orthodontia at any point in the future or ever. As time moves on and O grows older, the parties can address whether O needs orthodontia or any other particular form of medical care and who should pay for it. For present purposes, all we can and will decide is whether the circuit court was right to deny Mother's request that Father pay for orthodontia now, which it was.

**JUDGMENT OF THE CIRCUIT COURT FOR TALBOT COUNTY AFFIRMED. APPELLANT TO PAY COSTS.**

[6] "Any extraordinary medical expenses incurred on behalf of a child shall be added to the basic child support obligation and shall be divided between the parents in proportion to their adjusted actual incomes." FL § 12-204(h)(2).

[7] "Extraordinary medical expenses" includes uninsured, reasonable, and necessary costs for orthodontia, dental treatment, asthma treatment, physical therapy, treatment for any chronic health problem, and professional counseling or psychiatric therapy for diagnosed mental disorders. FL § 12-201(g)(2).