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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0350-21**

LISA LOMBARDI,

Plaintiff-Respondent/
Cross-Appellant,

v.

ANTHONY A. LOMBARDI,

Defendant-Appellant/
Cross-Respondent.

Argued November 16, 2022 – Decided April 3, 2023

Before Judges Haas and DeAlmeida.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Mercer County,
Docket No. FM-11-0113-11.

Brian G. Paul argued the cause for appellant/cross-respondent (Szaferman, Lakind, Blumstein & Blader, PC, attorneys; Brian G. Paul, of counsel and on the briefs).

Mark H. Sobel argued the cause for respondent/cross-appellant (Greenbaum, Rowe, Smith & Davis LLP,

attorneys; Mark H. Sobel, of counsel and on the brief;
Lisa B. DiPasqua, on the brief).

PER CURIAM

Defendant Anthony A. Lombardi appeals from an August 23, 2021 order of the Family Part awarding plaintiff Lisa Lombardi attorney's fees and costs after the court denied his application to terminate alimony based on alleged cohabitation. Lisa¹ cross-appeals from the same order to the extent it denies her application for an award of fees she incurred to hire an expert witness and other expenses. We affirm.

I.

The parties were married for twenty years when Lisa filed for divorce in 2010. After a twenty-five-day trial, the court entered a dual judgment of divorce (DJOD) and ordered Anthony to pay \$7,600 per month in alimony, as well as child support.² The trial court declined to award a savings component as part of Anthony's alimony obligation.

¹ Because the parties share a surname, we identify them by their first names. No disrespect is intended.

² The parties have three children. At the time that the order on appeal was issued, two of the children were emancipated and the youngest child was in college. Neither party challenges the child support award in this appeal.

We vacated the DJOD and remanded with directions that the trial court consider adding a savings component to Anthony's alimony obligation. Lombardi v. Lombardi, No. A-3624-13 (App. Div. Sep. 12, 2016). In 2018, the court on remand entered an order increasing Anthony's alimony obligation to \$21,888 per month and granting Lisa an alimony credit of over \$700,000.

Five days later, Anthony filed an application to terminate his alimony obligation, alleging Lisa was cohabitating with Edward Hershman. He also sought reimbursement of \$1,816,704 in alimony he paid after a 2014 date he alleged the cohabitation began. Alternatively, Anthony sought reimbursement of \$1,050,624 in alimony he paid after an alternate date in 2017 on which he alleged the cohabitation began.

The court determined that Anthony made a prima facie case of cohabitation based on hundreds of photographs taken by an investigator over a long period and scheduled a plenary hearing.

After a twenty-two-day hearing, the trial court issued a forty-five-page written opinion concluding that Lisa had established she had not cohabitated with Hershman. The court set forth a detailed analysis of the factors established in N.J.S.A. 2A:34-23(n). It found that Anthony "provided absolutely no evidence that [Lisa] and Hershman had intertwined finances of any kind over

the course of their eight-year dating relationship." The court noted that prior to trial, Lisa produced "thousands and thousands of financial statements including all her bank accounts and other financial accounts that failed to demonstrate" intertwined finances.

In addition, the court found that Hershman provided no financial contribution to the maintenance of Lisa's home and Lisa provided no financial contribution to the maintenance of Hershman's home, where he lived with two of his daughters. Hershman did not contribute to the household chores at Lisa's house, except for some "chivalrous" acts, such as removing snow from Lisa's car and walking her dogs when she was away. The court also found that Hershman did not pay for any expenses for Lisa's children. Nor, the court found, did Lisa pay for any expenses for Hershman's children. Apart from one trip during which Hershman paid his own way and stayed in his own hotel room while Lisa and her children stayed in a different room at the same resort, Anthony produced no evidence that Lisa and Hershman vacationed together.

Anthony hired an investigator who took approximately 1.2 million photographs of Lisa, Hershman, and their children. Not one of those photographs showed Lisa and Hershman kissing, holding hands, or hugging. The only photograph of Hershman's children at Lisa's home was on one occasion

when Lisa and her children were out of town and she allowed Hershman's daughters to use her pool while he walked her dogs. Anthony produced no photographs of Lisa or her children at Hershman's apartment, corroborating her testimony that she had never been to his home.

Anthony's investigator conducted surveillance at Lisa's house and Hershman's apartment, and followed the two to other locations. An employee of the investigator took a surreptitious video of Lisa and Hershman at a supermarket, getting behind them in line at the cashier in order to record who was paying for the groceries they had selected. The video, which effectively undermined Anthony's allegations, showed Lisa and Hershman separating the items they had gathered, with each separately paying for the groceries for their respective homes. The trial court found the investigator's testimony and report to be deceptive and inaccurate in several respects.

Both Anthony and Lisa presented cell phone tower experts concerning Hershman's location when he made cell phone calls. Anthony's expert admitted that could not identify with certainty a single cell phone call made by Hershman from Lisa's home. He conceded, however, that ninety-two percent of the 10,252 cell phone calls Hershman made during the relevant period could not have been made from Lisa's home. Lisa's expert agreed with the testimony of Anthony's

expert with respect to the absence of evidence that Hershman made any cell phone calls from Lisa's home.

The court concluded that although Lisa and Hershman maintained a long-standing dating relationship, they steadfastly maintained their mutual decision not to blend their families and to have a non-complicated relationship. As a result, the court denied Anthony's application.

The court then considered the request of both parties for the award of attorney's fees and costs. Anthony sought:

- (1) \$30,750 in attorney's fees relating to Lisa's pretrial motion to quash a subpoena served on Verizon for cell phone records;
- (2) \$419,311.50 in attorney's fees related to the termination application;
- (3) \$49,536 in fees for the investigator witness;
- (4) \$21,360 in fees for his cell phone tower expert;
- (5) \$7,866 in expenses relating to depositions;
- (6) \$16,087 in duplication costs.

Lisa sought:

- (1) \$724,248.61 in attorney's fees to defend against Anthony's application;
- (2) \$21,625 in fees for her cell phone tower expert;

(3) \$4,000 in fees related to mediation;

(4) \$5,610 in attorney's fees for counsel she retained to represent her two oldest children at their depositions.

In its written opinion, the court applied the factors set forth in N.J.S.A. 2A:34-23, R. 5:3-5(c), R. 4:42-9, and R.P.C. 1.5(a). The court found that Lisa was the prevailing party on the termination application.

In addition, the court found that both parties "have substantial assets exceeding at least \$4 million if not more for" Anthony. The court noted that on the termination proceedings Lisa spent the retroactive alimony credit awarded by the trial court a few days before Anthony made his application. With respect to Anthony's motivation for pursuing the application, the court found that

[o]ne wonders why [Anthony] continued his quest when he spent over \$325,000 towards his first investigator which presumably failed to establish cohabitation as this expert was never called as a witness. Defendant was unrelenting and his quest to leave no stone unturned including deposing his [two] oldest children with the court denying his request to depose his unemancipated daughter Thankfully, neither [child was] called to testify.

The court also noted that prior to entry of the DJOD, Lisa was compelled to file an application to remove Anthony from the marital home, which was successful, and to enforce a pendente lite support order, which was also

successful. In addition, Lisa filed an order to show cause when she learned Anthony was surreptitiously purchasing gift cards with marital funds from the parties' joint bank accounts to deplete marital assets. The trial court sanctioned Anthony \$7,777.60, half of the amount he removed from the joint accounts. Counsel fees previously were awarded to Lisa in each of these instances. The court also awarded Lisa \$78,214.75 in fees and \$6,244.72 in costs after her successful appeal. The Supreme Court awarded Lisa \$18,361 in attorney's fees and \$400.80 in costs after it denied Anthony's petition for certification.

The court found that Anthony's application required extensive time and labor by Lisa's counsel, given the length of the hearing and the number of witnesses, including two experts. In addition, the court noted that the investigator produced a 611-page report and a hard drive containing approximately 1.2 million photographs that Lisa's counsel was required to analyze. In addition, two investigators, two cell phone tower experts, and the parties' two children were deposed.

The court reviewed the certifications of counsel and found their hourly rates to be reasonable, given their experience and reputations. The court awarded the full amount of the requested attorney's fees to Lisa, with two exceptions.

The court concluded that Lisa was not successful with respect to her pretrial motion in connection with her attempt to bar the testimony of Anthony's investigator. The court found that Lisa was responsible for \$27,625 in attorney's fees she incurred on this motion, as well as the \$5,425 in fees Anthony incurred to oppose that motion.

The court also declined to award Lisa the \$5,610 in attorney's fees she incurred for counsel to represent her emancipated children at their depositions, finding that expenditure to be, in effect, a gift. The court directed each party to pay the costs of their own experts and mediation.

On August 23, 2021, the trial court entered an order: (1) denying Anthony's application to terminate his alimony obligation; (2) denying his application for attorney's fees and expert costs, except for \$5,425 in fees he incurred opposing Lisa's motion to bar his investigator's testimony; (3) awarding Lisa \$691,198.61 in attorney's fees and costs;³ (4) denying Lisa's motion for the attorney's fees she paid on behalf of her emancipated children; (5) denying Lisa's motion for the fees she incurred for her cell phone tower expert; and (6) denying Lisa's motion for an award of the fees associated with mediation.

³ \$724,248.61 - \$27,625 - \$5,425 = \$691,198.61.

Anthony appealed from the paragraphs of the order: (1) awarding Lisa attorney's fees and costs; and (2) denying him attorney's fees and costs relating to Lisa's pretrial motion to quash the subpoena served on Verizon. Anthony argues that the trial court abused its discretion and issued an unduly punitive award of fees to Lisa because: (1) she is financially able to pay her own fees; (2) the court did not find he acted in bad faith; (3) the court failed to engage in a loadstar analysis; and (4) the court awarded Lisa attorney's fees and costs relating to the Verizon subpoena motion that she lost and fee shifting on that motion as required by R. 4:10-3 and R. 4:23-1.⁴

Lisa cross-appealed from the paragraphs of the order: (1) awarding Anthony \$5,425 in attorney's fees incurred opposing her motion to bar his investigator's testimony;⁵ (2) denying her motion for the fees associated with her cell phone tower expert; (3) denying her motion for the attorney's fees she spent on behalf of her emancipated children; (4) denying her motion for the fees associated with mediation. She argues that while the court engaged in an

⁴ Anthony's submissions to this court state that the award of attorney's fees to Lisa was \$696,623. This figure does not account for the \$5,425 in attorney's fees awarded to him with respect to the Verizon motion.

⁵ Lisa appears to have abandoned this claim, as she requests that the court affirm the August 23, 2021 order to the extent that it awarded her attorney's fees.

appropriate analysis with respect to attorney's fees, it denied her request for expert fees, the fees associated with the defense of her emancipated children, and mediation fees without balancing the relevant factors, which favor her.

II.

The decision to award "attorney's fees rests within the sound discretion of the trial court." Maudsley v. State, 357 N.J. Super. 560, 590 (App. Div. 2003). "[F]ee determinations by trial courts will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion." Packard-Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 444 (2001) (quoting Rendine v. Pantzer, 141 N.J. 292, 317 (1995)); accord Berkowitz v. Berkowitz, 55 N.J. 564, 570 (1970). An abuse of discretion occurs "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. Immigr. and Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)).

Although New Jersey generally disfavors the shifting of attorney's fees, a prevailing party may recover attorney's fees if expressly provided by statute, court rule, or contract. Collier, 167 N.J. at 440 (citing North Bergen Rex Transp., Inc. v. Trailer Leasing Co., 158 N.J. 561, 569 (1999) and Dep't of Env't

Prot. v. Ventron Corp., 94 N.J. 473, 504 (1983)). A Family Part judge may award counsel fees at his or her discretion subject to the provision of Rule 4:42-

9. In determining the award, the judge should consider:

- (1) the financial circumstances of the parties;
- (2) the ability of the parties to pay their own fees or to contribute to the fees of the other party;
- (3) the reasonableness and good faith of the positions advanced by the parties both during and prior to trial;
- (4) the extent of the fees incurred by both parties;
- (5) any fees previously awarded;
- (6) the amount of fees previously paid to counsel by each party;
- (7) the results obtained;
- (8) the degree to which fees were incurred to enforce existing orders or to compel discovery; and
- (9) any other factor bearing on the fairness of an award.

[R. 5:3-5(c).]

A judge "shall consider the factors set forth in [Rule 5:3-5(c)], the financial circumstances of the parties, and the good or bad faith of either party." N.J.S.A. 2A:34-23.

In calculating the amount of reasonable attorney's fees, "an affidavit of services addressing the factors enumerated by RPC 1.5(a)" is required. R. 4:42-9(b); Twp. of W. Orange v. 769 Assocs., LLC, 198 N.J. 529, 542 (2009). RPC 1.5(a) sets forth the factors to be considered:

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent.

Courts determine the "lodestar," defined as the "number of hours reasonably expended" by the attorney, "multiplied by a reasonable hourly rate." Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009) (citing Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21 (2004)). "The court must not include excessive and unnecessary hours spent on the case in calculating the lodestar." Furst, 182 N.J. at 22 (citing Rendine, 141 N.J. at 335-36).

We have carefully considered the arguments raised by both parties and find sufficient support in the record to conclude that the trial court acted within its discretion with respect to the award of attorney's fees, expert fees, and costs. The trial court was quite familiar with the parties, the extensive pretrial proceedings, and, having held a twenty-two-day hearing, had ample opportunity to evaluate the strength of their respective positions. The court weighed the appropriate factors and reached a reasoned decision with respect to the parties' applications.

We are not persuaded by Anthony's argument that the court erred by not finding that Lisa is just as able to pay her attorney's fees and costs as he is and that because the parties are effectively financially equal he cannot be compelled to pay Lisa's attorney's fees in the absence of a finding that he acted in bad faith. The court found that each of the parties "have substantial assets exceeding at

least \$4 million." However, the court also found that Anthony may well have more than that amount of assets. The trial court was familiar with the relative earning potential of the parties and the fact that the attorney's fees Lisa incurred defending against what proved to be Anthony's baseless application wiped out the over \$700,000 she obtained as an alimony credit after her successful appeal. The trial court was aware of the significant economic impact on Lisa of Anthony's post-judgment application to terminate his alimony and acted within its discretion when it concluded that shifting her fees to Anthony was warranted.

In addition, nothing in the controlling statute, court rules, or legal precedents requires a finding of bad faith prior to the award of attorney's fees. Rule 5:3-5(c)(3) provides that the court "should consider" both the reasonableness of the positions taken by the parties and whether they acted in bad faith when considering an attorney's fee application. The Rule does not predicate the award of attorney's fees on a finding of bad faith. Here, the record amply supports the trial court's decision to award attorney's fees to Lisa, given Anthony's utter failure to produce convincing evidence of cohabitation, the court's finding that his investigator's report was inaccurate and misleading, the fact that his cell phone tower expert could not identify a single cell phone call by Hershman from Lisa's home, and Anthony's pretrial discovery tactics,

including taking the depositions of two of the couple's children after his investigator obtained no proof of cohabitation (and, in fact, obtained proof that Lisa and Hershman were not cohabitating).⁶

Nor are we convinced by Anthony's argument that the court abused its discretion with respect to the award of attorney's fees relating to Lisa's pretrial motion to suppress Anthony's request for her cell phone records. Although Lisa was not successful in quashing the subpoena served on Verizon, her motion made other claims for relief on which she succeeded, including obtaining a protective order to keep her unemancipated daughter from being deposed by her father's lawyers. To the extent Lisa was not successful on the motion, Rule 4:23-1(c), contrary to Anthony's arguments, does not mandate that the court require Lisa to pay Anthony's attorney's fees. The court retains the discretion to apportion fees in such circumstances in a just manner.

We are confident that the trial court, which found the hourly rates of Lisa's attorneys to be reasonable, undertook a sufficient review of the certifications

⁶ The trial court denied Anthony's attempt to take the deposition of his unemancipated daughter. While Anthony may have been within his rights to seek the depositions of his children, the trial court could not overlook the fact that he sought those depositions, which undoubtedly would strain the relationships between the children and their parents, after his investigator's lengthy surveillance of Lisa and Hershman produced no convincing evidence of cohabitation.

supporting her attorney's fee application prior to entering its order. The court was familiar with the extensive discovery produced in this matter, the long hearing, the legal submissions of counsel, and the performance of Lisa's attorneys. It is apparent that the trial court found the work performed by Lisa's attorneys to have been necessary to her defense and the hours expended by them to be reasonable.

We find the parties' remaining arguments, including those made in Lisa's cross-appeal, to lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION