STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1774

Jeffrey Longtin, petitioner,
Appellant,

vs.

Ann Longtin,
Respondent.

Filed July 28, 2009
Affirmed in part and reversed in part; motion granted
Larkin, Judge

Hennepin County District Court
File No. 27-FA-000278403

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Ann Longtin, 5554 Rowland Road, Minnetonka, MN 55343 (pro se respondent)

Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

On appeal from the denial of his motion to reduce his spousal-maintenance obligation, appellant challenges the district court's finding that he retired in bad faith and the district court's award of need-based and conduct-based attorney fees to respondent.

Because the evidence supports the district court's finding that appellant's retirement was voluntary and in bad faith, appellant failed to meet his burden of proving a substantial change of circumstances that justifies modification, and the district court did not abuse its discretion by denying appellant's modification motion. Nor did the district court abuse its discretion by awarding need-based attorney fees. But the conduct-based attorney-fee award was erroneous. We therefore affirm in part and reverse in part.

FACTS

Under the parties' 2004 stipulated judgment and decree, appellant Jeffrey Longtin was ordered to pay respondent Ann Longtin permanent spousal maintenance in the amount of $1,000 per month until respondent's death or remarriage, or further court order. Pursuant to a cost-of-living adjustment, appellant's current spousal-maintenance obligation is $1,040 per month. At the time of the 2004 judgment and decree, appellant was employed at Piper Jaffray. His annual gross income was $96,942. Appellant's employment with Piper Jaffray ended in September 2006. Appellant then obtained a position with RBC Dain Rauscher at a reportedly lower salary. The district court found that "It is unclear what [appellant's] monthly income was with RBC Dain Rauscher as he failed to provide that information to the Court or Respondent." Appellant remained employed at RBC Dain Rauscher until February 2008, at which time he claims he was laid off. After his employment with RBC Dain Rauscher ended, appellant chose to retire at age 60.

Appellant moved the district court to reduce his spousal-maintenance obligation, claiming that there had been a substantial decrease in his gross income. Respondent

opposed the motion, arguing that appellant intentionally retired in an attempt to terminate his spousal-maintenance obligation. Respondent also moved the district court for an award of attorney fees. The district court found that appellant's early retirement was voluntary and in bad faith and concluded that appellant has "the ability to support himself as well as continue to meet his permanent spousal maintenance obligation." The district court denied appellant's motion to decrease his spousal-maintenance obligation and ordered appellant to pay respondent $1,000 in need-based attorney fees and $500 in conduct-based attorney fees.

D E C I S I O N

I.

Whether to modify a spousal-maintenance award is discretionary with the district court. *Kemp v. Kemp*, 608 N.W.2d 916, 920 (Minn. App. 2000). In general, a district court has broad discretion in its decisions regarding spousal maintenance. *Erlandson v. Erlandson*, 318 N.W.2d 36, 38 (Minn. 1982). A district court abuses its discretion when its findings of fact are unsupported by the record or if it improperly applies the law. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). "Findings of fact concerning spousal maintenance must be upheld unless they are clearly erroneous." *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992); *see* Minn. R. Civ. P. 52.01 (stating that findings of fact "shall not be set aside unless clearly erroneous"). Findings of fact are clearly erroneous when they are "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 726 (Minn. 1985).

Modification of spousal maintenance is appropriate when a change in circumstances renders the original award "unreasonable and unfair." Minn. Stat. § 518A.39, subd. 2(a) (2008). A party seeking modification must show not only a substantial change in circumstances, but also that the change has the effect of rendering the original maintenance award both unreasonable and unfair. *See Nardini v. Nardini*, 414 N.W.2d 184, 198 (Minn. 1987). A substantial increase or decrease in the gross income of an obligor or obligee, or a substantial increase or decrease in the need of an obligor or obligee, is sufficient to show changed circumstances. Minn. Stat. § 518A.39, subd. 2(a). And if an obligor's gross income has decreased by at least 20% through no fault or choice of the party, then the statute presumes a substantial change in circumstances, and there is a rebuttable presumption that the terms of the current support order are unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2(b)(5) (2008).

But an obligor cannot rely on a bad faith election to terminate employment to justify a decrease in a maintenance obligation. *See Hemmingsen v. Hemmingsen*, __ N.W.2d __, __, No. A08-1136, 2009 WL 1919344 *4-5 (Minn. App. July 7, 2009) (holding that when an obligor's request for modification of spousal maintenance is based on the obligor's retirement at a normal or customary retirement age, and the obligee raises a colorable claim of bad faith, the obligor has the burden of proving that his or her change in circumstances was not in bad faith); *In re Marriage of Richards*, 472 N.W.2d 162, 164-65 (Minn. App. 1991) (discussing the same in the context of early retirement); *see also Goff v. Goff*, 388 N.W.2d 28, 30 (Minn. App. 1986) (explaining that "[a]lthough decreased earnings of the obligor is a basis for modification, an obligor cannot rely on the

election to terminate employment to justify a decreased [child-]support obligation"). "Where an obligor voluntarily creates a change of circumstances, the trial court should consider the obligor's motives." *Richards*, 472 N.W.2d at 164. With regard to bad-faith retirement, we have stated, "when an obligee raises a colorable claim of bad faith, an obligor must show by a preponderance of the evidence that a decision to retire early was not primarily influenced by a specific intent to decrease or terminate maintenance." *Id.* at 165. Whether an obligor's early retirement is in bad faith depends on a number of factors, including: the obligor's health and employment history, the parties' expectations regarding early retirement at the time of dissolution, and the prevailing managerial policies and economic conditions at the time of retirement, together with whatever subjective reasons the obligor may offer. *Id.*

The district court found that appellant's decision to retire early was voluntary and in bad faith. The district court concluded that the statutory presumption of a substantial change of circumstances under Minn. Stat. § 518A.39, subd. 2(b)(5), "does not apply to this case as [appellant] has retired by choice." Appellant argues that the district court erred by engaging in a bad-faith-retirement analysis under *Richards* because this analysis only applies when the change in circumstances is voluntary, and appellant claims to have been laid off from RBC Dain Rauscher. Even if appellant's separation from RBC Dain Rauscher was involuntary, appellant *chose* to retire rather than seek other employment. The record supports the district court's finding that "[appellant] is capable of employment by his own admission." Accordingly, appellant's decision to retire early was indeed voluntary and supports respondent's assertion that she made a colorable claim that

appellant's voluntary retirement was in bad faith. Appellant therefore had the burden to "show by a preponderance of the evidence that [his] decision to retire early was not primarily influenced by a specific intent to decrease or terminate maintenance." *Richards*, 472 N.W.2d at 165. The relevant inquiry is whether the district court erred in finding that appellant did not meet his burden of proof.

The district court's finding that appellant's decision to retire early was in bad faith is reviewed under a clearly erroneous standard. *Gessner*, 487 N.W.2d at 923. In addressing whether bad faith existed, the district court considered, but was not persuaded by, appellant's offered reasons for early retirement—the "unprecedented collapse of the financial industry" and medical concerns including a diagnosis of carpal-tunnel syndrome in his right wrist and tendonitis in his right shoulder.

Although appellant's argument regarding the collapse of the financial industry may be relevant to appellant's ability to find work in his area of expertise, it does not automatically preclude appellant from finding a related job, prevent him from finding other types of employment, or prohibit him from seeking either type of employment. Appellant's own admission that he can work at a retail home-improvement store or at a similar job underscores this point. And the district court found that appellant's claims of inability to work were "in the form of mere averments and lack specificity." With regard to appellant's cited medical concerns, the district court noted that the only documentation appellant provided to support his argument were health records from March 2006. The district court also noted that six months after appellant's documented medical visit, appellant opposed respondent's cost-of-living adjustment yet failed to raise any medical

issues. The district court found that "[appellant] cites his medical issues; however, he continued in his career for two years after the medical report he now cites as support for his conditions." The district court obviously did not find appellant's claims regarding his inability to work and medical complications credible, and we defer to the district court's credibility determination. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

The district court's finding that appellant's early retirement was voluntary and in bad faith is reasonably supported by the evidence as a whole and not clearly erroneous. Appellant therefore failed to meet his burden of proving a substantial change of circumstances that renders his existing spousal-maintenance obligation unreasonable and unfair, and appellant is not entitled to modification. Accordingly, the district court did not abuse its discretion by denying appellant's motion to modify his spousal-maintenance obligation. Because there was no basis for modification, the district court's imputation of income to appellant was unnecessary and we do not address it.[1] *See Hemmingsen*, __ N.W.2d at __, No. A08-1136, 2009 WL 1919344 at *7 (explaining that "if the district court makes adequate findings to support its ruling that appellant created changed circumstances in bad faith, the court need not address appellant's ability to pay").

Similarly, because appellant failed to establish a basis for modification, there was no need for the district court to make findings regarding the statutory factors that govern a determination of the amount of spousal maintenance. *See* Minn. Stat. § 518A.39, subd.

[1] Moreover, we question whether there is adequate evidentiary support for the district court's finding that $40,000 is an appropriate amount of imputed income. Appellant agrees that "the $40,000 figure was independently determined by the referee" and "technically outside of the record."

2(d) (2008) (setting forth factors). When a district court denies a motion for modification of spousal maintenance based on the obligor's failure to show a substantial change in circumstances, the district court need not make further findings on statutory factors. *Tuthill v. Tuthill*, 399 N.W.2d 230, 232 (Minn. App. 1987) (stating that "[t]he failure to show such a [substantial change in circumstances] precludes a modification of maintenance obligations under [statute]. Therefore, it is not necessary for the [district] court to make findings regarding any other factors addressed in the statute.").

II.

Appellant challenges the district court's award of both need-based and conduct-based attorney fees to respondent. "The standard of review for an appellate court examining an award of attorney fees is whether the district court abused its discretion." *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999). *But cf. Holmberg v. Holmberg*, 588 N.W.2d 720, 727 (Minn. 1999) (stating that Minn. Stat. § 518.14, subd. 1 (2008) "requires the court to award attorney fees if the fees are necessary to allow a party to continue an action brought in good faith, the party from whom fees are requested has the means to pay the fees, and the party seeking fees cannot pay the fees"). *See generally Geske v. Marcolina*, 624 N.W.2d 813, 817-18 (Minn. App. 2001) (addressing 1990 amendments to Minn. Stat. § 518.14, as well as recovery of attorney fees under Minn. Stat. § 518.14, subd. 1, in both district court and appellate court).

A district court "shall award attorney fees, costs, and disbursements" if it finds:

> (1) that the fees are necessary for the good faith assertion of the party's rights in the proceeding and will not

> contribute unnecessarily to the length and expense of the proceeding;
>
> (2) that the party from whom fees, costs, and disbursements are sought has the means to pay them; and
>
> (3) that the party to whom fees, costs, and disbursements are awarded does not have the means to pay them.

Minn. Stat. § 518.14, subd. 1. "Conclusory findings on the statutory factors do not adequately support a fee award." *Geske*, 624 N.W.2d at 817. But a lack of specific findings on the statutory factors for a need-based fee is not fatal to an award if review of the district court's order "'reasonably implies' that the district court considered the relevant factors and . . . the district court 'was familiar with the history of the case' and 'had access to the parties' financial records.'" *Id.* (quoting *Gully*, 599 N.W.2d at 825-26).

The district court made appropriate findings regarding need-based attorney fees. In particular, the district court found that (1) "[r]espondent incurred attorney[] fees in order to respond to [appellant's] motion for a decrease in his spousal maintenance"; (2) "[r]espondent is dependent on the permanent spousal maintenance in order to meet her monthly needs"; (3) "[respondent] does not have the ability to pay the fees she incurred in these proceedings"; and (4) "[appellant] does have the ability to contribute to [r]espondent's attorney[] fees." The district court's findings indicate that the court properly considered the statutory factors, and we affirm the $1,000 need-based attorney-fee award. *See id.*

Conduct-based fee awards "are discretionary with the district court." *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007); *see* Minn. Stat. § 518.14, subd. 1

(stating that "[n]othing in this section . . . precludes the court from awarding, in its discretion, additional fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding"). The district court must set forth findings that "permit meaningful appellate review on the question whether attorney fees are appropriate because of a party's conduct." *Kronick v. Kronick*, 482 N.W.2d 533, 536 (Minn. App. 1992). This court considers whether the record contains evidence that appellant's conduct unreasonably contributed to the length or expense of the litigation. *See Geske*, 624 N.W.2d at 818 (stating that the moving party has the burden of showing that the nonmoving party "unreasonably contributed to the length or expense of the proceeding").

The district court found that "[appellant] has unreasonably contributed to the length and expense of this proceeding in that he entered early retirement with the intent to end his spousal maintenance obligation." But precedent establishes that conduct-based attorney fees must be based on conduct occurring *during* litigation. *Id.* at 819 ("Because conduct-based attorney fees under Minn. Stat. § 518.14, subd. 1, are to be based on behavior occurring during the litigation process, behavior occurring outside the litigation process is not a basis for a conduct-based fee award under that provision."). The district court's finding in support of its award of conduct-based attorney fees is based on conduct that preceded the litigation. The district court's findings do not identify any conduct that occurred during the litigation and unreasonably contributed to its length or expense. And we see no evidence of such conduct in the record. We therefore reverse the $500 conduct-based attorney-fee award.

III.

Appellant moves to strike respondent's appendix and portions of respondent's brief, arguing that the challenged portions pertain to matters outside the record on appeal. Respondent opposes the motion. "The papers filed in the [district] court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Minn. R. Civ. App. P. 110.01. The general rule is that an appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below. *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). New documentary evidence of a conclusive nature, which supports the result obtained in the district court may be considered. *In re Real Prop. Taxes for 1980 Assessment; Village Apartments v. State*, 335 N.W.2d 717, 718 n.3 (Minn. 1983). This court has discretion to consider documents that meet the requirements of the exception, but is not required to do so. *In re Livingood*, 594 N.W.2d 889, 896 (Minn. 1999).

Respondent's appendix contains three e-mails exchanged by the parties in March 2008. These e-mails are not part of the record on appeal, but respondent cites them as evidence to support her argument that appellant retired in bad faith. Although the extra-record documents in respondent's appendix are offered to affirm the district court's order, we decline to consider them because the e-mails pertain to disputed matters and have no conclusive value. *See id.* (holding that the court of appeals did not abuse its discretion in refusing to consider extra-record documents because respondent failed to establish that the materials had conclusive value).

Whenever a brief references any part of the record, reference shall be made to the specific pages of the appendix or supplemental record or to the particular part of the record, suitably designated, and to the specific pages of it. Minn. R. Civ. App. P. 128.03. Appellant moves to strike certain factual assertions in respondent's brief that are not supported by citations to the record and that pertain to matters outside the record. Respondent argues that these assertions are true and are made in response to appellant's arguments. Because we limit our review to the proper record on appeal, we will not consider factual assertions that are unsupported by the record. Accordingly, we grant appellant's motion to strike respondent's appendix and the portions of respondent's brief pertaining to extra-record matters.

Affirmed in part and reversed in part; motion granted.

Dated: _____ _____
The Honorable Michelle A. Larkin