SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0292-12T3

TAMI CORRELLO,

Plaintiff-Respondent/
Cross-Appellant,

v.

DOUGLAS CORRELLO,

Defendant-Appellant/
Cross-Respondent.

Argued December 12, 2016 – Decided December 29, 2016

Before Judges Nugent and Haas.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Mercer County, Docket No. FM-11-393-03B.

Douglas Corrello, appellant/cross-respondent, argued the cause pro se.

David Perry Davis argued the cause for respondent/cross-appellant.

PER CURIAM

This post-judgment matrimonial matter returns to us after remand proceedings directed by our previous orders of April 16, 2013, September 27, 2013 and October 4, 2013. In his amended

notice of appeal, defendant Douglas Corrello challenges portions of the Family Part's April 10, 2014 order which, among other things, recalculated defendant's alimony and child support obligations. Defendant also contests diverse provisions of the trial court's previous orders of May 25, 2012, June 13, 2012, August 24, 2012, July 3, 2013, September 20, 2013, November 22, 2013, February 7, 2014, and March 26, 2014.[1]

In her "second amended notice of cross-appeal," plaintiff Tami Corrello also challenges aspects of the trial court's April 10, 2014 order, as well as the August 24, 2012, July 3, 2013, September 20, 2013, November 22, 2013, and March 26, 2014 orders. After reviewing the record in light of the applicable law, we affirm in part, reverse in part, and remand for further proceedings.

I.

The parties are fully familiar with the procedural history and facts of this case and, therefore, they will not be repeated in detail in this opinion. The parties were married in October 1992 and have four children. In October 2002, plaintiff filed her complaint for divorce. The parties' final judgment of divorce ("FJOD") was entered in October 2004 after a fifteen-day trial.

[1] We discuss the terms of these orders below.

During the marriage, plaintiff initially worked as a financial analyst, earning approximately $33,000 a year. After the parties' first child was born, plaintiff no longer worked outside of the home. When she filed for divorce in 2002, plaintiff got a part-time job earning $4330 per year. The trial judge found that plaintiff was underemployed and had "the education and experience to work earning $50,000 annually according to the expert testimony" presented at the divorce trial. Defendant worked as a police officer during the marriage and, at the time plaintiff filed her complaint for divorce, was earning approximately $81,000 per year.

In the FJOD, the trial judge ordered defendant to pay plaintiff $352 per week in permanent alimony until the parties' youngest children (twins) reached the age of fourteen in 2012. At that time, the alimony would be automatically "stepped down" to $100 per week. The judge also ordered defendant to pay plaintiff $263 per week in child support for the four children. Shortly thereafter, the judge amended the FJOD to require defendant to pay $307 per week in child support.

After the divorce, plaintiff worked in various financial positions in medical offices, earning up to $33,141 a year. However, plaintiff developed muscular dystrophy ("MD") in 2012 and was forced to leave her job. In July 2013, the Social Security

Administration ("SSA") found that plaintiff was disabled and granted her application for Social Security Disability ("SSD") benefits. Plaintiff receives $1295 per month and an additional $645 a month for the children in SSD benefits.

In March 2011, defendant was injured in a car accident while on the job, and he retired on a disability pension from his police officer position effective September 1, 2012. He receives $3770 per month in pension benefits.[2] Although defendant asserted he was unable to work after the accident in any position, his former treating physician testified in a deposition that defendant could work with appropriate accommodations in a job where he did not need to sit or stand for more than thirty minutes at a time, or lift more than ten to twenty pounds.

With regard to the orders at issue here,[3] plaintiff filed a motion in April 2012 seeking to delay the alimony step-down scheduled to take place in May 2012. Plaintiff alleged that one of the twins had special needs and, therefore, the alimony should

[2] Plaintiff receives $666 per month as her share of this martial asset.

[3] In the years following the divorce, the parties each filed numerous motions concerning various provisions of the FJOD and other matters. The orders resulting from those motions are not at issue in this matter.

continue at the $352 per week rate. Defendant opposed the motion and filed a cross-motion to, among other things, hold plaintiff in contempt because she used $8000 from the oldest child's Uniform Gift to Minors Account ("UGMA") at Vanguard to buy a car for the child. On May 25, 2012, the trial judge[4] granted plaintiff's motion to indefinitely delay the effective date of the step-down provision and denied defendant's motion to hold plaintiff in contempt.[5] On August 24, 2012, the judge denied defendant's motion for reconsideration and plaintiff's motion for clarification of the prior order.

Defendant then filed a notice of appeal from the August 24, 2012 order, and plaintiff filed a cross-appeal from that order. While the appeal was pending, defendant filed a motion in the trial court to terminate his alimony obligation and to recalculate child support based on changed circumstances, specifically, his decreased income now that he was receiving a disability pension. Because of the pending appeal, the trial judge declined to exercise jurisdiction under Rule 2:9-1(a), and adjourned the motion without date.

[4] The same trial judge presided over all of the post-judgment motions involved in this case.

[5] The judge issued an amended order on June 13, 2012, which did not substantively change these rulings.

Plaintiff then filed a motion seeking an order requiring defendant to contribute to the oldest child's college costs. She also asked that defendant place a portion of any future proceeds awarded to him in his pending personal injury lawsuit into a constructive trust for the children. On April 16, 2013, we granted plaintiff's motion to remand the matter to the trial court to permit it to consider her motion. We also retained jurisdiction.

On July 3, 2013, the trial judge denied defendant's motion to terminate alimony because of lack of jurisdiction, and ordered that a plenary hearing be conducted concerning defendant's motion to recalculate child support based on the parties' current disability status. The judge also ordered a plenary hearing on the issue of college costs, and denied plaintiff's motion to establish a constructive trust "as premature and speculative" because defendant had not yet received any proceeds from his lawsuit.

On September 27, 2013, we granted defendant's motion to remand the alimony issue to the trial court so it could be included in the matters involved in the pending plenary hearing. Our order also stated that, after the plenary hearing was completed, either party could file an amended notice of appeal or cross-appeal. We continued to retain jurisdiction.

The parties next could not agree on discovery issues. Defendant filed a motion to quash discovery subpoenas plaintiff had issued to several banks. Plaintiff cross-moved to expand discovery. On September 20, 2013, the trial judge found that the subpoenas were not authorized by the court's prior discovery orders. On October 26, 2013, the judge granted defendant's motion for $2035.02 in counsel fees and costs as a discovery sanction. The judge denied plaintiff's motion for reconsideration on November 22, 2013,[6] but permitted plaintiff some additional discovery.

When plaintiff failed to pay defendant the counsel fees and costs ordered by the trial court, defendant filed a motion to enforce the October 26, 2013 order. On February 7, 2014, the trial judge allowed the unpaid counsel fees and costs to be credited against defendant's support obligations.

The trial judge conducted a plenary hearing on ten non-consecutive dates between October 23, 2013 and March 11, 2014. On March 27, 2014, the judge rendered an oral opinion, followed by an amended order on April 10, 2014. With regard to the parties' pending motions, the judge: (1) denied defendant's motion to

[6] On March 26, 2014, the trial judge issued an order that required plaintiff to pay defendant $1830 in counsel fees and costs because her motion for reconsideration was unsuccessful.

terminate his obligation to pay alimony to plaintiff; (2) imputed $1070 in monthly income to plaintiff and reduced the alimony she received from defendant to $100 per week effective July 1, 2013; (3) recalculated the child support due to plaintiff based on her imputed income to $253 per week effective July 1, 2013; (4) denied both parties' motions for counsel fees; (5) ordered defendant to pay 55% of the parties' oldest child's college costs; (6) required the oldest child to provide defendant with school and employment information; and (7) denied plaintiff's motion to require defendant to establish a trust for the benefit of the parties' children if he received a settlement or jury award in his pending personal injury action. This appeal and cross-appeal followed.

II.

In his appeal, defendant raises the following contentions:

> POINT I
>
> THE 5/25/12 ORDER DELAYING THE FINAL JUDGMENT OF DIVORCE STEP-DOWN SHOULD BE REVERSED AS THE PLAINTIFF DID NOT ESTABLISH THE REQUIRED CHANGE IN CIRCUMSTANCE.
>
> POINT II
>
> THE TRIAL COURT ERRED BY FINDING THE RECONSIDERATION MOTION OF DEFENDANT HUSBAND "A MERE SUR[-]REPLY."
>
> POINT III
>
> DEFENDANT HAS RELIED FOR TEN YEARS UPON THE FINALITY OF THE FJOD AND PLAINTIFF PROVED NO

CHANGE IN CIRCUMSTANCE. PLAINTIFF[']S IMPUTED INCOME SHOULD BE ENFORCED.

POINT IV

FRAUD SHOULD HAVE PRECLUDED PLAINTIFF FROM RECEIVING RELIEF IN HER MOTION TO ELIMINATE THE STEP[-]DOWN PROVISION OF ALIMONY.

POINT V

THE CONDITION OF [THE] PARTY'S [YOUNGEST CHILD] DOES NOT MEET CHANGE OF CIRCUMSTANCE DEFINITION.

POINT VI

THE TRIAL COURT ERRED IN RULING THAT PLAINTIFF'S ACTION LIQUITDATING [SIC] THE VANGUARD ACCOUNT FOR [THE PARTIES' YOUNGEST CHILD] WAS JUSTIFIED.

POINT VII

THE TRIAL COURT ERRED IN CONSIDERATION OF THE [NEWBURGH] FACTORS WHEN ORDERING DEFENDANT TO CONTRIBUTE TO [THE PARTIES' OLDEST CHILD'S] COLLEGE.

POINT VIII

THE TRIAL COURT SHOULD HAVE GRANTED DEFENDANT[']S REQUEST FOR COUNSEL FEES IN VIEW OF THE PLAINTIFF[']S CIS FRAUD AND FAILURE TO FOLLOW ORDERS INCLUDING THE FJOD AND DISCOVERY ORDERS.

POINT IX

THE TRIAL COURT ERRED WHEN IT IMPUTED INCOME TO DISABLED ACCIDENT VICTIM DEFENDANT.

POINT X

ALIMONY SHOULD BE ELIMINATED AS PLAINTIFF'S BENEFITS HAVE INCREASED AS A RESULT OF DEFENDANT'S DISABILITY AND FORCED RETIREMENT.

POINT XI

THE TRIAL COURT ERRED WHEN IT DID NOT INCLUDE PLAINTIFF'S PENSION INCOME IN CHILD SUPPORT GUIDELINE CALCULATIONS.

POINT XII

THE TRIAL COURT ERRED WHEN IT DID NOT ORDER REPAYMENT SCHEDULE FOR SUPPORT OVERPAYMENT CREDIT.

POINT XIII

TRIAL COURT ERRED WHEN IT ORDERED PROBATION ACCOUNT TO BE SET AT ZERO BUT DID NOT ACCOUNT FOR INTERIM PAYMENTS RECEIVED BY PLAINTIFF.

POINT XIV

THE APPELLATE DIVISION SHOULD EXERCISE ORIGINAL JURISDICTION TO REDRESS THE FINANCIAL INJUSTICE CAUSED BY THE LOWER COURT'S ERRONEOUS RULING.

Our review of a trial court's fact-finding in a non-jury case is limited. Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011). "The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence. Deference is especially appropriate when the evidence is largely testimonial and involves questions of

credibility." Ibid. (quoting Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)).

Moreover, we owe substantial deference to the Family Part's findings of fact because of that court's special expertise in family matters. Cesare, supra, 154 N.J. at 411-12. Thus, "[a] reviewing court should uphold the factual findings undergirding the trial court's decision if they are supported by adequate, substantial and credible evidence on the record." MacKinnon v. MacKinnon, 191 N.J. 240, 253-54 (2007) (alteration in original) (quoting N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007)).

While we owe no special deference to the judge's legal conclusions, Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995), "we 'should not disturb the factual findings and legal conclusions of the trial judge unless . . . convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice' or when we determine the court has palpably abused its discretion." Parish v. Parish, 412 N.J. Super. 39, 47 (App. Div. 2010) (quoting Cesare, supra, 154 N.J. at 412). We will only reverse the judge's decision when it is necessary to "ensure that there is not a denial of justice because the family court's conclusions are []clearly

mistaken or wide of the mark." Id. at 48 (alteration in original) (internal quotations omitted) (quoting N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008)).

After reviewing the record in light of these principles, we conclude that all of defendant's contentions are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We therefore affirm the portions of each of the orders challenged by defendant substantially for the reasons that the trial judge expressed at the time he entered each order. We add the following brief comments concerning some of defendant's contentions.

Contrary to defendant's contentions in Points I, II, III, IV, and V, plaintiff established a sufficient change of circumstances to support the trial judge's May 25, 2012 decision to postpone the effective date of the alimony step-down. Lepis v. Lepis, 83 N.J. 139, 146 (1980) (observing that alimony defines "only the present obligations of the former spouses" and the "duties are always subject to review and modification on a showing of 'changed circumstances'" (quoting Chalmers v. Chalmers, 65 N.J. 186, 192 (1974))). Here, the trial judge's decision to add the step-down provision to the FJOD in 2004 was based upon the presumption that plaintiff would be able to achieve her full earning capacity of $50,000 by 2012, when the twins turned fourteen. However, as the

deadline approached, plaintiff began to suffer from MD and was declared disabled by the SSA. In addition, one of the twins had special needs that increased the family's living expenses. Under these circumstances, the judge appropriately delayed the implementation of the step-down provision without prejudice to defendant's right to bring future applications in the event of a change of circumstances.

There is also no merit to defendant's contention in Point VI that plaintiff's medical condition and the child's special needs were known to the parties at the time the trial court included the step-down provision in the FJOD. The court's decision at the time of the FJOD specifically stated that the parties' "physical and emotional health is unremarkable. No major physical problems are proven." Moreover, the child's condition did not fully manifest itself until 2010, long after the parties were divorced.

Because defendant presented no new arguments in support of his motion for reconsideration, the trial judge did not abuse his discretion by denying this motion on August 24, 2012. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (holding that reconsideration should only be used for those cases where the court "has expressed its decision based upon a palpably incorrect or irrational basis," or when the court "did not consider, or failed to appreciate the significance of probative, competent

evidence" (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401-02 (Ch. Div. 1990))). In addition, there was no competent evidence presented at the hearing to support defendant's claim that plaintiff provided "fraudulent" information in her Case Information Statement.

We also discern no abuse of discretion in the trial judge's decision concerning plaintiff's use of the UGMA account to buy the parties' oldest child a car. The UGMA was established by defendant's grandfather. In the trial court's decision accompanying the FJOD, the court stated that the account was the property of the child and that "[n]either party shall withdraw funds from [the] account[] without the express written consent of the other."

Shortly before the oldest child turned seventeen, she wanted a car to use at college and to get to work. Plaintiff located a suitable car which, if the purchase was promptly made, would enable the child to save a considerable sum of money. Plaintiff sent an email to defendant to obtain his consent to use funds in the UGMA account, and he responded with "questions and concerns." Plaintiff answered defendant's inquiries by return email and when defendant failed to respond further, plaintiff withdrew the money from the child's account and bought her the car.

Under these circumstances, the judge found that although plaintiff did not obtain defendant's "express written consent" prior to the purchase, she did advise defendant of the child's wishes and, due to the "urgency" of the situation, plaintiff's actions were "excusable." We detect no abuse of discretion in the judge's reasonable ruling.

Contrary to defendant's contentions in Point VII, the trial judge considered all twelve factors set forth in Newburgh v. Arrigo, 88 N.J. 529, 545 (1982) before ordering defendant to pay 55% of the oldest child's college costs. Because of her hard work in high school, the child was accepted at a major university. The child applied for all available student scholarships, grants and loans and, as a result, defendant needed to contribute $3500 to cover his 55% share of the remaining costs of college, plus a similar contribution for one-time expenses related to her matriculation.

Defendant argued that the child should attend a community college, but the cost of going to a community college was comparable to the expenses defendant was being asked to pay for the child's preferred institution. In his Newburgh analysis, the judge reasonably concluded that these practical considerations outweighed the fact that defendant had not seen his oldest child since 2007. See Gotlib v. Gotlib, 399 N.J. Super. 295, 309 (App.

Div. 2008) (stating that a trial court's decision "should not be based on any single [Newburgh] factor"); see also Gac v. Gac, 186 N.J. 535, 546 (2006) (noting that "[a] relationship between a non-custodial parent and a child is not required for the custodial parent or the child to ask the non-custodial parent for financial assistance to defray college expenses").

Finally, the trial judge did not err in imputing additional income to defendant as part of the recalculation of his alimony and child support obligation.[7] It is well settled that "[i]ncome may be imputed to a party who is voluntarily unemployed or underemployed." Golian v. Golian, 344 N.J. Super. 337, 341 (App. Div. 2001) (citing Dorfman v. Dorfman, 315 N.J. Super. 511, 516 (1998)).

Here, defendant was unable to work as a police officer and was receiving a disability pension. However, unlike plaintiff,

[7] We discuss the trial judge's decision to impute income to plaintiff below. At this time, however, we note that the judge properly rejected defendant's contention that plaintiff's equitable distribution share of his police pension should have been treated as income "for the purposes of determining alimony." Innes v. Innes, 117 N.J. 496, 505 (1999). On this same topic, the parties advised us at oral argument that they now agree that the judge should have considered plaintiff's share of defendant's pension in calculating child support. Child Support Guidelines, Pressler & Verniero, Current N.J. Court Rules, Appendix IX-A to R. 5:6A at www.gannlaw.com (2017). Therefore, the judge shall take this income into account in recalculating child support on the remand as discussed below.

the SSA denied defendant's application for SSD benefits. He presented no medical or employability expert testimony at trial to indicate that he could not work at a different job, such as a police dispatcher or similar position in the private sector. Using the New Jersey Department of Labor Employment Statistics for these types of positions, the judge used an hourly wage of $20.64 for a twenty-hour week, to impute a gross yearly income of $21,466, which he then used as part of his calculation of defendant's new alimony and child support obligations. We detect no abuse of discretion in the judge's determination.

As for the balance of any of defendant's arguments not expressly discussed above, we again note that they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

III.

We now turn to the arguments plaintiff raises in her cross-appeal. Plaintiff contends:

> [POINT I.]
>
> THE FINANCIAL ASPECTS OF THE TRIAL COURT'S SEPTEMBER 20, 2013, NOVEMBER 22, 2013 AND APRIL 10, 2014 ORDERS MUST BE REVERSED AND THE PRE-HEARING STATUS QUO REINSTATED.
>
> A. The Trial Court Erred in Holding That the Issuance of an Order for a Post[-]judgment Plenary Hearing Does Not

Authorize the Issuance of Deposition Subpoenas.

B. The Trial Court Erred in Denying Plaintiff's Cross Motion Seeking to Enforce and Expand Discovery.

C. The Trial Court Erred in Declining to Address Plaintiff's Application for an Order to Show Cause Enforcing the Limited Discovery Permitted via the November 22, 2013 Order.

D. The Trial Court's October 26, 2013 and March 26, 2014 Orders Awarding Defendant Counsel Fees as a Discovery Sanction Should Be Reversed.

E. The Trial Court Erred By Modifying Defendant's Alimony Obligation.

F. The Trial Court Erred in its Determination That Income Should Be Imputed to Plaintiff.

[POINT II.]

THE TRIAL COURT ERRED BY INSTRUCTING THAT THE CHILDREN MUST CONTINUE TO ATTEMPT TO INVOLVE DEFENDANT IN THEIR LIVES WITHOUT REQUIRING THAT THE DEFENDANT FIRST COMPLY WITH THE TWO STANDING ORDERS FOR REUNIFICATION THERAPY.

[POINT III.]

THE TRIAL COURT ERRED IN ITS DECISION TO REDUCE SUPPORT WITHOUT IMPOSING A CONSTRUCTIVE TRUST OVER A PORTION OF THE PROCEEDS.

[POINT IV.]

THE COURT ERRED IN ITS FAILURE TO AWARD PLAINTIFF COUNSEL FEES.

[POINT V.]

FURTHER PROCEEDINGS IN THIS MATTER SHOULD BE HEARD BY A DIFFERENT JUDGE.

A.

As was the case with the arguments defendant raised in his appeal, the majority of plaintiff's contentions in her cross-appeal are without sufficient without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We therefore affirm the trial judge's orders as they relate to the arguments plaintiff raises in Points I.A, I.B, I.C, I.D, II, III, and V of her brief substantially for the reasons that the trial judge expressed in the opinions he rendered in connection with each order. We add the following brief comments concerning some of plaintiff's contentions.

With regard to plaintiff's arguments in Point I concerning the discovery process established by the trial judge for the plenary hearing, and the attorney fees and costs he ordered plaintiff to pay as a sanction for discovery violations, we "generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011) (quoting Rivers v. LSC P'ship, 378 N.J. Super.

68, 80 (App. Div.), certif. denied, 185 N.J. 296 (2005)). Applying that well-settled standard, we discern no abuse of discretion in any of the judge's rulings relating to discovery.

The July 3, 2013 order did not specifically authorize the discovery subpoenas that plaintiff later issued and, as the trial judge found in the September 20, 2013 order, any discovery beyond interrogatories, notice to produce or depositions required court approval. Plaintiff did not seek permission prior to issuing the discovery subpoenas. Therefore, the judge correctly found that the subpoenas were unauthorized and, on November 22, 2013, imposed appropriate monetary sanctions for counsel fees and costs. The judge's decision on March 26, 2014 to assess additional fees and costs when plaintiff filed an unsuccessful motion for reconsideration of the November 22, 2013 order was also not an abuse of discretion.

Plaintiff's argument that the trial judge erred by denying her motion to impose a constructive trust on any proceeds from defendant's personal injury lawsuit also lacks merit. On July 3, 2013, the judge denied this motion as "premature and speculative" because defendant had not yet received any damages award. After the plenary hearing, the judge ordered defendant to notify plaintiff of the terms and amount of any settlement or award within seventy-two hours of a jury verdict or settlement. The judge's

reasoned resolution of this issue was clearly appropriate under the circumstances presented.[8]

Contrary to plaintiff's contentions, none of the trial judge's orders required the children to "continue to attempt to involve defendant in their lives." The only order related to plaintiff's contention is the April 10, 2014 order, which directed the parties' oldest child to provide defendant with information concerning school and employment. This directive was reasonable given defendant's responsibility, as discussed above, to contribute to the cost of the child's college education.[9]

As for the balance of any of plaintiff's arguments in Points I.A, I.B, I.C, I.D, II, III, and V of her brief not expressly discussed above, we again note that they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

B.

We now turn to plaintiff's contentions in Points I.E and I.F that the trial judge erred by imputing $1070 in additional monthly

[8] At oral argument, the parties advised us that defendant's personal injury case was subsequently resolved and he complied with the notification requirement imposed by the judge. Therefore, plaintiff's attorney stated that this issue was now moot.

[9] We note that the two youngest children are now eighteen years old.

income to her and recalculating defendant's alimony and child support obligations based on that imputed income. We agree that the judge incorrectly imputed additional income to plaintiff under the circumstances of this case and, therefore, we remand the matter to the trial court for a new determination of defendant's alimony and child support obligations.

As previously noted, a trial judge may impute income "to a party who is voluntarily unemployed or underemployed." Golian, supra, 344 N.J. Super. at 341. However, a party who is unable to work because of a disability is not intentionally "unemployed or underemployed" and, therefore, income should not be imputed to them. Ibid.

As we observed over fifteen years ago in Golian, "[a] party asserting inability to work due to disability bears the burden of proving the disability." Ibid. In this case, however, as was the case in Golian, plaintiff had been adjudicated as disabled by the SSA because she suffers from MD. "That adjudication required a finding that her physical and mental impairments were 'of such severity that [s]he is not only unable to do [her] previous work but cannot, considering [her] age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.'" Ibid. (alterations in original) (quoting 42 U.S.C.A. § 423(d)(2)(A)).

Therefore, we held that an "SSA adjudication of disability constitutes a prima facie showing that plaintiff is disabled, and therefore unable to be gainfully employed, and the burden shifts to defendant to refute that presumption." Id. at 342-43. We also explained that the evidence a party could present to rebut the presumption of disability could include "lay testimony, expert testimony[,] or medical records, consistent with the Rules of Evidence, as the trial court deems appropriate." Id. at 343. If the opposing party is able to rebut the presumption of disability, the trial judge may then impute income to the party receiving SSD benefits. Id. at 341-43.

In this case, the trial judge did not correctly apply the clear holding of Golian. Here, plaintiff had been adjudicated disabled by the SSA and began receiving SSD benefits on July 1, 2013. Thus, plaintiff successfully presented a prima facie case that she was "disabled, and therefore unable to be gainfully employed, and the burden shift[ed] to defendant to refute that presumption." Id. at 342-43. Defendant did not present any expert testimony or medical records to contradict the SSA's determination of disability, nor did he request any of plaintiff's medical records in discovery. Thus, the judge should have concluded that defendant failed to meet his burden to refute the validity of the

SSA's determination, and denied his request to impute additional income to plaintiff.

However, the trial judge held that even though the SSA had already ruled that plaintiff was disabled, that was insufficient to establish a prima facie case of disability and, therefore, plaintiff was required to submit medical proofs demonstrating her disability anew. In so ruling, the judge mistakenly relied on a trial court's decision in Gilligan v. Gilligan, 428 N.J. Super. 69, 73 (Ch. Div. 2012),[10] rather than our controlling decision in Golian. See Gormley v. Wood-El, 218 N.J. 72, 114 (2014) (noting that "[t]he decisional law of the Appellate Division is not only binding on our trial courts, but is an expression of the law of our State unless the New Jersey Supreme Court says otherwise").

[10] In Gilligan, the trial court stated, contrary to the shifting burden of proof we established in Golian, that the SSA's declaration that a party was disabled was insufficient to enable that party to establish a prima facie case of disability. Gilligan, supra, 428 N.J. Super. at 80-81. Instead, the court held that even though a party had been adjudicated as disabled, that party was still required to provide more evidence to the court "than simply the SSD award letter itself to prove his or her case." Id. at 73. However, as we specifically stated in Golian, a party's "SSA disability status . . . results in a presumption of inability to work and the burden should be on [the opposing party] to rebut that presumption before income can be imputed to" the party receiving SSD benefits. To the extent the trial court's decision in Gilligan is inconsistent with our ruling in Golian, we disapprove of it.

Based upon our clear holding in Golian, plaintiff successfully made out a prima facie case of disability when she introduced the SSA's adjudication in evidence. As noted above, the burden then shifted to defendant to refute the presumption that plaintiff was unable to work. Because defendant failed to introduce any competent evidence to meet that burden,[11] the judge mistakenly imputed additional income to plaintiff and incorrectly used that income to recalculate defendant's alimony and child support obligations. Therefore, we reverse the judge's conclusions on this point and remand for further proceedings to enable the trial court to recalculate support based upon a proper determination of the financial resources available to plaintiff.

As required by N.J.S.A. 2A:34-23(a) and (b), on remand the trial court must also address the parties' current financial

[11] In his March 27, 2014 oral decision, the trial judge stated that a medical doctor had opined in a deposition submitted in evidence that plaintiff was unable to sit for more than half an hour at a time. However, based on his observations of plaintiff as she testified, the judge found that plaintiff was able "to sit for more than a half an hour." The judge pointed to this finding as evidence that plaintiff may not have been disabled and, therefore, should have provided additional medical evidence to verify the SSA's adjudication of disability. However, the judge was mistaken. The doctor in question was defendant's treating physician, who was discussing defendant's medical condition. This doctor never examined plaintiff and never rendered any opinion concerning her disability. Thus, the judge's findings on this point were not supported by the record and we therefore reject them. Cesare, supra, 154 N.J. at 412.

situations, and the other statutory factors for determining alimony and child support. Therefore, the parties should submit updated Case Information Statements for the court's review pursuant to Rule 5:5-2. The remand proceedings should be completed within 120 days. Pending the completion of the remand, and subject to a possible retroactive offset or refund thereafter should the judge modify these obligations, defendant shall continue to pay plaintiff $100 per week in alimony and $253 per week in child support as required by the April 10, 2014 order.

Because we are remanding the matter for additional proceedings, we also reverse the portion of the trial judge's April 10, 2014 order denying plaintiff's motion for counsel fees as requested in Point IV of her brief. On the remand, plaintiff may renew her arguments based on the outcome of those proceedings.

Finally, plaintiff requests in Point V that the remand be handled by a different trial judge. We have carefully considered the record in this matter and find no evidence of bias or any other reasons requiring the assignment of a different judge on remand. Therefore, we reject defendant's contention on this point. R. 2:11-3(e)(1)(E).

C.

In sum, we reverse the portions of the trial court's April 10, 2014 order imputing income to plaintiff and recalculating

defendant's alimony and child support obligations on the basis of that imputed income, and the provision in that order denying plaintiff's application for counsel fees. We remand for further proceedings consistent with this opinion. In all other respects, the April 10, 2014 order and all of the other orders listed in the parties' notices of appeal are affirmed.

Affirmed in part; reversed in part; and remanded. We do not retain jurisdiction.