THIRD DIVISION
December 2, 2015

NO. 1-14-1524

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

In re the Marriage of:	)	Appeal from the Circuit Court of Cook County, Illinois.
PENNY J. MUNAO,	)	
Petitioner-Appellee,	)	No. 07D330305
v.	)	The Honorable Patricia M. Logue, Judge Presiding.
ANTHONY L. MUNAO,	)	
Respondent-Appellant.	)	

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Pucinski in the judgment.

ORDER

¶ 1 Held: In post-dissolution of marriage case, trial court's denial of husband's motion to modify or terminate maintenance award affirmed where husband failed to show changed circumstances; and attorney fees award upheld. Affirmed.

¶ 2 In this post-dissolution cause, respondent-appellant Anthony Munao (Anthony) appeals from the circuit court's order denying his motion to modify or terminate the

maintenance he was previously ordered to pay to petitioner-appellee Penny Munao (Penny) and its orders requiring Anthony to pay a portion of Penny's attorney fees. Anthony contends the trial court erred where: (1) it denied Anthony's motion to modify or terminate maintenance without an evidentiary hearing where both parties' financial circumstances have changed drastically since the maintenance order was entered; (2) Penny has sufficient funds to pay her own attorney fees and Anthony's financial circumstances are such that he is unable pay Penny's fees; and (3) the portion of the attorney fees award specific to fees incurred in bankruptcy court is improper. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 These parties were previously in this court regarding various issues stemming from the dissolution of their marriage. Many of the basic facts herein are taken from that order. *In re Marriage of Munao*, 2011 IL App (1st) 101153-U (unpublished order under Supreme Court Rule 23).

¶ 6 Anthony and Penny were married in 1989 and lived together thereafter in Elgin, Illinois. There were no children born of the marriage. Anthony filed a petition for dissolution of marriage in March 2007.

¶ 7 During the marriage, the couple enjoyed a comfortable lifestyle, travelling together and dining out frequently. Anthony pursued an expensive automobile racing hobby for 15 years which racing-related expenses, for example, cost $200,000 in 2007. Anthony was the primary income earner during the marriage and paid most the couple's expenses.

¶ 8 During the marriage, in 1991, Anthony started an automobile repair business called Anthony's Professional Automotive (Professional Automotive). This business was

consistently busy until 2009, after which business decreased. Even after the decrease, however, Anthony continued earning between $14,000 and $20,000 per month from Professional Automotive.[1] The most Penny earned during the marriage was $24,427 per year working as a nursing assistant. Anthony controlled the household finances and major decisions.

¶ 9 The trial court found the value of Professional Automotive to be $150,000.

¶ 10 Penny brought her four children from a previous relationship to the marriage. These children were ages 3, 4, 5, and 6 years at the time of the marriage. Penny has a high school diploma and a nursing assistant certificate. She was mainly responsible for domestic duties during the marriage. At the time of trial, she was working approximately 10 hours per week and earning $8 per hour. She had been applying for full-time positions.

¶ 11 Anthony met a woman named Vanessa in 2005. They had a child together in 2008. While Anthony and Penny were still married, Anthony provided child support for the child, as well as paid Vanessa's mortgage, gas, electric, garbage, water, and cable bills at Vanessa's house. Anthony bought Vanessa $5,000 worth of jewelry.

¶ 12 Regarding family finances, this court noted in its previous Rule 23 order:

> "At the time Anthony filed for divorce, there was approximately $87,000 of credit available on a home equity line of credit for the marital residence. Anthony liquidated the entire credit line by having a check sent payable to himself for $67,000 and another check payable to cash for $16,000, and used the remainder for various expenses. The court ordered Anthony to deposit the $67,000 into an escrow account, but Anthony instead deposited it into his individual account.

[1] Anthony disagrees with this income amount on appeal, but acknowledges that the circuit court and the appellate court both determined this number was correct.

Regarding the $16,000, on the same day this amount was withdrawn, Anthony's mistress, Vanessa Hill, tendered $16,000 for a down payment on her house. Anthony testified that the money did not go to Vanessa's down payment, but was unable to account for where it may have gone. Regarding the $16,000, the trial court stated in its judgment for dissolution of marriage:

> 'The court found it disturbing and not so credible as to Anthony's explanation as to the removal of the $16,000 from the credit line on the same day Vanessa Hill wrote a check for $16,000[.]' "

The court determined that Anthony had dissipated marital assets in the amount of $300,000 but, due to mitigating circumstances such as Anthony having provided for Penny and her children as a stepfather, officially found $150,000 of dissipation. The court ordered Anthony to pay Penny $75,000 for the dissipation. The court also ordered Anthony to pay Penny $75,000, representing one-half of the automotive business, and ordered that "[a]ll stock and assets of [Professional Automotive] to be placed in trust until Anthony makes [the $75,000] payment." Additionally, the court ordered Anthony to pay a portion of Penny's attorney fees, and awarded Penny permanent maintenance in the amount of $2,600 per month.

¶ 13 In addition to the above, the court specifically awarded Penny her lawsuit, stating:

> "J. Penny Jo is awarded the 2004 Nissan Murano, her lawsuit, her retirement accounts and all her personal property presently in her possession. Anthony is awarded the trailer, motor home and all cars in his possession known or unknown to the court and shall indemnify and hold Penny Jo harmless."

¶ 14 The court granted the dissolution of marriage (JDOM) in December 2009, at the end of a 14-day trial, noting:

> "Anthony wanted Penny out of his life without having to fulfill his obligation under the law and his wanting to move on with his new family as if there was never this previous 20-year marriage to Penny. The court believes his actions throughout the pendency of the divorce supports this belief."

¶ 15 Anthony appealed to this court. *In re Marriage of Munao*, 2011 IL App (1st) 101153-U (unpublished order under Supreme Court Rule 23). By that appeal, Anthony contended the trial court erred where it: (1) ordered him to pay Penny $2,600 per month in permanent maintenance; (2) abused its discretion regarding the distribution of martial property; (3) allowed Penny's expert to testify regarding the value of the marital business; (4) ordered Anthony to pay a portion of Penny's attorney fees; (5) found that Anthony had dissipated marital assets and ordered him to pay Penny $75,000; and (6) denied Anthony's motion to reconsider. We affirmed. In the portion of our decision regarding maintenance, we found that the amount of maintenance ordered was not an abuse of discretion. We also noted:

> "In the case at bar, the parties' marriage was of long duration. Penny had no other training aside from her nursing assistant certificate. For much of the marriage, Penny did not work outside of the home. Her therapist testified that Penny was unable to work in her current condition. On the other hand, Anthony's income is somewhere between $13,983 and $20,220 per month. Penny introduced substantial evidence at trial showing her standard of living during the marriage, including living in a $540,000 home, going on exotic vacations, dining out, and buying new clothes. Based upon the evidence before us, we, like the trial

court see no likely possibility that Penny will be able to generate sufficient income to meet her needs or the lifestyle maintained during the parties' marriage. The trial court's award of permanent maintenance was not an abuse of discretion.

We note, however, that while the judgment provides maintenance on a permanent basis, should there be a substantial change in circumstances—such as an increase in Penny's earning capacity or a decrease in Anthony's resources, or if Penny were to marry or cohabit with another person on a resident, continuing conjugal basis, the maintenance award would be reviewable in court. See 750 ILCS 5/510 (West 2010). Under the circumstances of this case, it was neither unreasonable nor against the manifest weight of the evidence for the court to determine that Penny should receive $2600 per month in permanent maintenance from Anthony." *In re Marriage of Munao*, 2011 IL App (1st) 101153-U (unpublished order under Supreme Court Rule 23).

¶ 16 In August 2010, approximately 9 months after the JDOM was entered, Anthony filed a 3-count motion to modify maintenance pursuant to section 510 of the Illinois Marriage and Dissolution Act (750 ILCS 5/510 (West 2010)). By the count pertinent to this cause, Anthony asked the court to modify or terminate maintenance due to a change in circumstances, *i.e.*, Anthony's financial situation had changed.

¶ 17 Regarding the change in his financial situation, Anthony argued that: (1) the court relied on incorrect information at trial regarding his finances; (2) Anthony had to close Professional Automotive on May 19, 2010, due to a "downturn in business," that Anthony's mother opened a new business in the same location the following day, May 20, 2010, and that she now pays Anthony a "salary of a gross of $1,000 per week and a net of $650 per

week" after the court-ordered child support is withheld; (3) that as a result of his "substantial reduction in income," he now pays less in child support for the child born to Vanessa, plus an additional payment toward a "large arrearage that had accrued"; (4) that he "does not have sufficient funds to even meet his bare necessities which, according to case law, come before the obligation of maintenance; (5) and that Penny had failed to seek employment, even though she is capable of supporting herself. Anthony argued that this "significant change of circumstances" warranted a modification or abatement of his maintenance obligation.

¶ 18 In December 2010, Anthony filed a motion for leave to file an amended count for modification of maintenance. By that motion, Anthony argued that Penny was working full-time and had received "at least" $48,000 in "gross settlement dollars" from a personal injury suit in which she was an injured passenger in a car driven by Dan Michaels. Anthony also stated he believed Penny's credit card debtors had "written off" her debt. Anthony filed another motion for leave to file an amended count for modification of maintenance just a few weeks later, in which he made the same arguments as this motion.

¶ 19 In June 2011, Anthony filed a motion to terminate maintenance pursuant to section 504 of the Act (750 ILCS 5/504 (West 2010)). By this motion, Anthony asked the court to terminate maintenance due to a change in circumstances, that is, that Penny had not sought employment although she had a duty to do so, and that Penny had received a "substantial" personal injury award.

¶ 20 Then, in March 2012, Anthony filed an "amended and supplemental petition" to modify maintenance. By this motion, Anthony alleged he had lost his job when the business owned by his mother closed on February 29, 2012. He had since found work with the CINTAS company where, he estimates, he earns approximately $5,000 to $6,000 per month.

He asked the court to modify maintenance retroactive to August 2010, when the original motions to modify/terminate the maintenance were filed.

¶ 21 In September 2010, Anthony filed for bankruptcy in the United States Bankruptcy Court for the Northern District of Illinois in a case titled: *In re the Bankruptcy of Anthony Munao*, case no. 10-42568.

¶ 22 Penny was represented by attorney David Mann throughout the dissolution proceedings in the trial court. In March 2011, Penny and Mann retained law firm Laduzinsky & Associates, P.C. (Laduzinsky) to handle the appellate case. In April 2011, Penny also retained Laduzinsky for legal representation in the bankruptcy case. Penny explains she filed an adversary complaint in the bankruptcy case in order to prevent the court from "discharging Anthony's obligations to Penny under the JDOM and also challenging Anthony's transfer of [Professional Automotive] to his mother as a fraudulent transfer made in an attempt to avoid his obligations under the JDOM." She describes Anthony as "uncooperative" during the pendency of the bankruptcy case, which behavior, according to Penny, necessitated that Laduzinsky issue subpoenas to various third parties. Some of these subpoenas are included in the record on appeal. She also explains that, "on multiple occasions," Laduzinsky had to file, serve and present petitions for rule to show cause directed at Marcel Kuper, Anthony's personal and business accountant, in order to obtain compliance with the production of documents related to Anthony and Anthony's businesses. He also prepared for and took the depositions of Anthony and his mother, Bonnie Munao.

¶ 23 In January 2012, Penny filed a petition for attorney fees and costs seeking attorney fees for her representation in the appellate case. By that motion, Penny asked the court to order Anthony to contribute to the attorney fees charged by Laduzinsky in the amount of

$42,777. She alleged that her counsel had spent an unusually large amount of time on the appellate case because Anthony's counsel filed improper briefs and motions, and submitted an "incomplete and disorganized" record of the parties' 14-day trial. In addition, Penny argued that she was "without sufficient liquid assets or income" with which to pay the fees, explaining that, at that time, she worked part-time and earned approximately $256 per month, while Anthony earned between $13,000 and $20,000 per month, "as determined" by the court. She acknowledged that Anthony "claims to have 'transferred' [his] business to his mother," but that there "are proceedings currently pending in the United States Bankruptcy Court for the Northern District of Illinois to rescind this transfer as fraudulent."

¶ 24 Penny filed another petition for attorney fees and costs in June 2013. By that motion, Penny sought fees pursuant to section 508 of the Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/508(a)(3) (West 2012), for fees incurred in representing Penny in both the appellate case and the bankruptcy case. Penny claimed she could not afford to pay the attorney fees because she was working part-time at that time, earning approximately $500 to $700 per month. She claimed Anthony could afford to pay the attorney fees because Anthony was "working full-time at a successful automotive repair business" and earning between $13,000 and $20,000 per month. She stated:

> "Furthermore, Penny is without sufficient resources to pay Laduzinsky's fees, as she only earns approximately $500-$700 per month. Conversely, Anthony's financial resources are far greater, as he earns considerable income from an automotive business."

Penny explained she had incurred attorney fees to Laduzinsky of $60,990, of which she had paid a total of $5,000 to him for his representation in the bankruptcy case. Laduzinsky

discounted Penny's outstanding balance to $28,846 as a professional courtesy. She asked the court to order Anthony to pay $28,846 to Laduzinsky & Associates for Penny's attorney fees and costs.

Anthony filed a reply to this petition, arguing that Penny could have paid the fees when they were incurred with an award she received for her personal injury lawsuit. He also argued that, while the court did determine he was making between $13,000 and $20,000 per month at the time of the dissolution, there was no proof that remained the case. Instead, Anthony argued, Professional Automotive was dissolved and Anthony now works "basically" as a CINTAS independent contractor, driving vans around Chicagoland repairing trucks "at about half the $13,000 low side of that former finding (not the $20,000 high side)." Anthony also argued that the amount of fees requested was unreasonable.

¶ 25 Penny filed motions in limine, asking the court to bar Marcel Kuper as an expert witness because he did not submit an expert witness report and to bar Anthony from testifying as to whether his business was losing money because he had refused to release his financial information to Penny's counsel. She also asked for sanctions pursuant to Supreme Court Rule 219 for failure to produce said documents during discovery.

¶ 26 Anthony's motion to modify or terminate maintenance was set for a hearing on May 22 and 23, 2013. At that hearing, the parties appeared and were prepared to present evidence. The court first addressed Penny's motions in limine. Regarding Kuper, Penny's counsel told the court:

> "[PETITIONER'S COUNSEL MR. BYRNE:] Okay. Then the next issue is a violation of Supreme Court Rule 213. Mr. Kaplan [Anthony's counsel] has listed

in his exhibits, although I haven't seen the reports, reports of Marcel [Kuper] which are his Exhibits 16 and 30. Now, he hasn't disclosed those exhibits.

We've issued 213 interrogatories. The 213 interrogatories require him to give all opinions. Those reports are opinions. Here was his initial response.

It says, Marcel [Kuper], just his address, and then his supplemental response was Marcel [Kuper] will testify as an independent expert witness and will testify as to his knowledge of the business in which Anthony Munao has had an interest, including but not limited to Vans Fleet Service; the accounting associated with the business; the accuracy of the books and records kept by Anthony in the ordinary course of business; the preparation of tax returns, ledgers, and any information gleaned from depositions reviewed by Mr. [Kuper]; the net income of Anthony as of August 2010 when the first motion to modify was filed as well as current and any other areas relating to Anthony's operation of the business presently owned and operated by him and any rebuttal to accounting testimony submitted on behalf of petitioner.

He never gave a report. He never gave an opinion witness report. He never submitted the exhibits which are listed, and I still haven't seen them in his exhibit list of 16 through 30.

Under Supreme Court Rule 213, you can't just give a general statement as to what an expert is going to testify to. You have to disclose his opinions."

¶ 27 After verifying that Anthony's counsel still intended to use Kuper as an expert witness, the court allowed Anthony's counsel to respond. Anthony's counsel responded that he had

sent many documents to Penny's counsel, including tax returns and documents showing "account balances, adjusting balances, and so forth." Penny's counsel responded:

> "MR. BYRNE: Those are not reports from Marcel [Kuper]. These are reports printed off of QuickBooks or Peachtree.
>
> I followed-up with [respondent's counsel] Mr. Kaplan. I wanted the underlying data file so I could see what's in each one of these components. Nowhere in this letter is disclosed that these are Mr. [Kuper's] opinions."

The court stated that these were "just notes." The court asked if Kuper had an opinion, and Anthony's counsel explained:

> "[RESPONDENT'S COUNSEL MR. KAPLAN]: Judge, the opinion we've got in—he's the one that prepared the tax returns that they've had form 2010, '11' 12' and '13.
>
> In the answer to the interrogatories, Mr. Byrne sent me a 213 request on April 22nd, April 22nd of this year, and so we filed a supplemental answer which listed what the areas were that he was going to testify to, and they dealt with the operation of the business, Mr. Munao's new business, how it operates, et cetera, et cetera. It's all in our answer to [213].
>
> We were supposed to go over the 37 exhibits, Mr. Laduzinsky and I. He contacted me. I said we'll get together at a certain date. We never got together. I said here's my phone number. Call me after 7:00 o'clock tonight. I'll have my exhibit list with me. He never contacted me.
>
> Yesterday was the same thing; to contact me. I never got a call from him. I got an email."

The court directed Anthony's counsel to show Penny's counsel the documents. Penny's counsel said the documents had never been provided and "[n]ot only that, it's not a disclosed opinion." The trial court barred Kuper from testifying as an expert witness for failure to provide an expert witness report.

¶ 28 Regarding Anthony testifying regarding his company allegedly losing money, stating:

> "MR BYRNE: I sent a request to Mr. Munao for a copy of his QuickBooks ledger. I asked Mr. Kaplan for the QuickBooks ledger. He submitted a couple—he gave me this graph with a pie chart, and I said let me see the Quickbooks so I can do my own analysis.
>
> ***
>
> He wouldn't turn it over. He didn't give us access to the books and record of his company, so I think it's disingenuous for him to come in now and say my company is losing money. I think he should be barred from presenting testimony on that."

¶ 29 Because Anthony did not produce his requested financial information including his QuickBooks, Penny's counsel asked that he be barred from presenting evidence regarding the purported losses of his business. Penny's other attorney told the court Anthony should also be barred from testifying at all because his business and personal income were intertwined, that Anthony uses his businesses as his "personal piggy banks" stating, in part:

> "MR. LADUZINSKY: With regard to this, Judge, is there's payments coming out of this alleged business for his personal use, okay, which impacts his income. Mr. Munao's definition of income is whatever I want to put down on my tax return, okay, and so he should not be allowed—in essence, he's self-employed, and in

order to get a true and accurate picture of what his income is, you have to look at his business and look at his income."

¶ 30 After significant discussion between the parties and the court, the court asked Anthony's attorney if he would provide the requested information to Penny's attorney. He said he would. Penny's attorney, however, pointed out that they were in the middle of litigation and that getting this vital information on one night and being expected to use it the next day was impossible, as he would have to go through it and "pick apart each of the entries and the classifications of what they put in rent; what they put in this; what expenses are here." The court then barred Anthony's testimony in this regard, stating:

"THE COURT: Well, I mean, there's rules. You don't have the expert. He's already out.

***

Because, you know, very basic rules aren't followed, this is the situation where, you know, he made his choice. He didn't produce it."

¶ 31 Noting it had heard arguments on the motions in limine, the court entered an order on May 22, 2013, dismissing with prejudice the motion to terminate or modify maintenance.

¶ 32 Various hearings and motion practice followed.

¶ 33 On April 21, 2014, the circuit court entered the following order:

"The court having reviewed the relevant briefs, rulings, and motions; the Appellate Court having affirmed the rulings of the trial court ***; Penny having paid her appellate her appellate attorney Steven M. Laduzinsky of Laduzinsky and Assocs. $2000 toward fees; the appellate court finding Anthony's briefs violated Supreme Court rules resulting in more work for appellee's attorneys to strike

> improper briefs/filings/arguments of Anthony; this Court finding that the fees incurred and outstanding include multiple instances of repetitive efforts by more than one attorney to do same work or review same work product on Penny's behalf, The Court reduces the fee award to $31,556 which includes costs of $183.50 + reflects Penny's $2000 payment. Said fees are fair + reasonable. It is appropriate to order Anthony to pay a significant amount of said fees as they are attributable to his unsuccessful appeal + failure to comply with appellate rules. Anthony shall pay Laduzinsky + Assocs. $500/month for 48 months on the 1st of each month toward Penny's fees. Penny shall pay the remainder to her attorneys on terms they shall mutually arrange, i.e. $7,556."

¶ 34 Then, on April 25, 2014, the trial court entered another order under section 508(b) of the Act, requiring Anthony to pay Laduzinsky $5,000 in attorney fees for his representation of Penny during the bankruptcy case. In its memorandum order, the court notes that the petition "fails to identify the statutory section on which it is based," but, relying on *In re Marriage of Kent*, 267 Ill. App. 3d 142, 143 (1994), decided that, because "an Illinois trial court has jurisdiction to award fees under Section 508(b) for enforcement proceedings in federal bankruptcy court, if all other statutory criteria are met," the court would assume Penny's claim rests on section 508(b), as well. In its order, the trial court noted that, although the dissolution court had ordered Anthony to place all stocks and assets of Anthony's Professional in trust until Anthony paid what he owed to Penny under the JDOM, Anthony never did so. The court stated:

> "Anthony never did place the stock and assets of the marital business in trust. In the bankruptcy action it became clear that he had transferred or 'sold'

> those assets to his mother, Bonnie Munao, who opened a new business—on paper anyway—and closed the business that was to be held in trust until Penny was paid. Magically, of course, the physical assets of the business were still being used by Anthony after this transaction. His mother, who lives on Washington Island, Wisconsin and owns a shipyard there, was not repairing cars with her son in Illinois. She was, however, underwriting Anthony and his family's expenses."

The court also noted that Anthony had been held in contempt for failing to pay Penny the amount owed under the JDOM. Additionally, it stated:

> "In the divorce, Anthony was awarded and still resides in the Chippewa marital home with his new wife and their children. He was to refinance the residence and all jointly held assets and remove Penny's name from these assets and related debts but apparently has not."

¶ 35 Anthony appeals.

¶ 36 II. ANALYSIS

¶ 37 i. The Denial of the Motion to Modify or Terminate Maintenance

¶ 38 Anthony appeals from the court's denial of his motion to modify or terminate maintenance. Specifically, Anthony contends the denial was an abuse of discretion where "the available evidence suggests that Penny's financial circumstances have increased while Anthony's have decreased" and because the trial court denied the motion without first conducting an evidentiary hearing.

¶ 39 Under section 510 of the Illinois Marriage and Dissolution of Marriage Act, which governs modifications of maintenance, "an order for maintenance may be modified or

terminated only upon a showing of a substantial change in circumstances." 750 ILCS 5/510 (the Act) (West 2012). A "substantial change in circumstances" means that either the needs of the spouse receiving maintenance or the ability of the other spouse to pay that maintenance has changed. *In re Marriage of Anderson*, 409 Ill. App. 3d 191, 198 (2011). The party seeking modification bears the burden of establishing a substantial change of circumstances. *In re Marriage of Anderson*, 409 Ill. App. 3d at 198. Additionally, "a maintenance award is *res judicata* only to those facts at the time it is entered, and changed circumstances justifying the modification of maintenance must occur after the award." *In re Marriage of Connors*, 303 Ill. App. 3d 219, 226 (1999).

¶ 40 A trial court's decision to modify maintenance will not be disturbed absent a clear abuse of discretion. *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009). A clear abuse of discretion takes place when " 'the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.' " *Blum*, 235 Ill. 2d at 36 (quoting *People v. Hall*, 195 Ill. 2d 1, 20 (2000)).

¶ 41 Before we address the question of whether the trial court properly denied the motion to modify or terminate maintenance, we must first address an underlying issue. Although on appeal Anthony argues that the trial court's denial of his motion was an abuse of discretion and against the manifest weight of the evidence in part because "the trial court failed to conduct an evidentiary hearing before denying Anthony's Motion with prejudice," and Penny responds that the trial court denied him such hearing "as a sanction for failing to disclose the opinions of Marcel Kuper, his expert witness and personal and business accountant, and for his failure to provide access to the underlying documents and actual Quickbooks data files that supported his Quickbooks ledger and financial reports," neither party fully addresses this

issue on appeal. We first consider whether the trial court's ruling without a hearing was an abuse of discretion, and then whether the ruling itself was against the manifest weight of the evidence.

¶ 42 Supreme Court Rule 219(c) authorizes the circuit court to prescribe sanctions, including barring witnesses from testifying, when a party fails to comply with the court's orders regarding discovery. 166 Ill. 2d R. 219(c); *Athans v. Williams*, 327 Ill. Ap. 3d 700, 703 (2002). The imposition of sanctions is within the discretion of the circuit court, and the court's decision in fashioning a sanction will not be disturbed on appeal absent a clear abuse of that discretion. *Athans*, 327 Ill. App. 3d at 703.

¶ 43 When this court considers whether the circuit court abused its discretion in applying a sanction, we must look to the same factors that the circuit court was required to consider in deciding an appropriate sanction. *Smith v. P.A.C.E.*, 323 Ill. App. 3d 1067, 1076 (2001). These factors include: (1) the surprise to the adverse party; (2) the prejudicial effect of the witness' testimony; (3) the nature of the testimony; (4) the diligence of the adverse party; (5) the timeliness of the objection; and (6) the good faith of the party seeking to offer the testimony. *Peal v. Lee*, 403 Ill. App. 3d 197, 203 (2010). "Of these factors, no single one is determinative and each case presents a unique factual situation which must be taken into consideration when reviewing the propriety of a particular sanction." *Peal*, 403 Ill. App. 3d at 203.

¶ 44 The purpose of discovery rules governing the timely disclosure of expert witnesses " 'is to avoid surprise and to discourage strategic gamesmanship' " among the parties." *Steele v. Provena Hospitals*, 2013 IL App (3d) 110374, ¶ 92 (quoting *Spaetzel v. Dillon*, 393 Ill. App.

3d 806, 812 (2009)). Illinois Supreme Court Rule 213 deals with written interrogatories to parties and provides, in pertinent part:

> "(f) Identity and Testimony of Witnesses. Upon written interrogatory, a party must furnish the identities and addresses of witnesses who will testify at trial and must provide the following information:
>
> * * *
>
> (3) Controlled Expert Witnesses. A 'controlled expert witness' is a person giving expert testimony who is the party, the party's current employee, or the party's retained expert. For each controlled expert witness, the party must identify: (i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefor; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case." Ill. S.Ct. R. 213 (eff. Jan 1, 2007).

¶ 45 The decision of whether to admit or exclude evidence, including whether to allow an expert to present certain opinions, rests solely with the discretion of the circuit court and will not be disturbed absent an abuse of discretion. *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 36-37 (2010). Such an abuse of discretion occurs only if no reasonable person would take the view adopted by the circuit court. *Foley v. Fletcher*, 361 Ill. App. 3d 39, 46 (2005). The disclosure requirements of Rule 213 are "mandatory" and subject to a party's "strict compliance." *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 109 (2003). Thus, a trial court should not hesitate sanctioning a party for its failure to adequately comply with the Rule 213 disclosure requirements. *Sullivan*, 209 Ill. 2d at 109.

¶ 46 We first find that Anthony did in fact violate Rule 213's disclosure requirements when he failed to disclose any conclusions or opinions by Kuper. We agree with the trial court that financial documents and printouts do not amount to an opinion report by an expert. To be in compliance with discovery, Anthony should have provided Penny with a report detailing Kuper's opinions.

¶ 47 We next consider whether the sanction of barring Kuper's expert testimony was appropriate. To do so, we consider the following factors to determine whether an abuse of discretion occurred: surprise, prejudice, the type of evidence at issue, diligence, timeliness of objection, and good faith. *Peal*, 403 Ill. App. 3d at 203. Here, it is unclear whether Penny would have been surprised by Kuper's testimony, as the details of this undisclosed opinion are unclear. Presumably, though, the overarching import of the opinion would have been that Anthony was losing money both in his personal and professional life, and that his financial circumstances had changed such that he could not afford the court-ordered maintenance payments. Therefore, the prejudicial effect to Penny of this testimony—particularly when provide for the first time at trial without the advantage of a prior opinion report—would have been great. As to the third factor, the nature of the testimony, the testimony would have been financial in nature, with facts and opinions drawn from those facts. The nature of these opinions, formed by an individual connected to Anthony both personally and professionally, leads this court to believe that Penny would have had a difficult time responding to them if brought for the first time in court, without the benefit of a prior disclosure. As to the final three factors, nothing in the record suggests Penny was anything but diligent in conducting discovery, including requesting the opinion report from Anthony, filing motions in court throughout discovery and, eventually, motions for sanctions for these discovery violations.

She was timely in doing so. Anthony, on the other hand, operated in bad faith throughout these proceedings, refusing to offer an opinion report even after being informed he was in violation of discovery rules.

¶ 48 Having carefully reviewed the record before us, we find no evidence that the trial court abused its discretion in barring Marcel Kuper's expert testimony. We note that an appellate court can uphold Rule 219(c) sanctions even where a circuit court has not specifically set out its findings. See *Peal*, 403 Ill. App. 3d at 206.

¶ 49 The court also barred Anthony from testifying as to his finances where his personal and professional finances were intricately intertwined and Anthony failed to comply with discovery as to his Quickbooks financial records. Again, we note that the supreme court rules on discovery are mandatory rules of procedure that courts and counsel must follow. *Klingelhoets v. Charlton-Perrin*, 2013 IL App (1st) 112412, ¶ 38. Additionally, in determining whether the exclusion of a witness was a proper sanction for nondisclosure, we consider the following factors: surprise, prejudicial effect of the testimony, nature of the testimony, diligence of the adverse party, the timely objection to the testimony, and the good faith of the party calling the witness. *Peal*, 403 Ill. App. 3d at 203. We first determine that Anthony did, in fact, violate the discovery procedures of Rule 213 by failing to comply with document production requests. On appeal, Anthony describes the hearing on the motion in limine, stating: "Anthony's lawyer pleaded with the court, to no avail, to allow him to produce the electronic documentation the same day or evening as the parties would be in court the following day. Clearly, the problem would have been solved had the request been granted and Anthony would have been allowed to testify." This court disagrees; the problem would never have occurred in the first place had Anthony properly complied with discovery,

providing the appropriately requested documentation rather than waiting until the day of trial and, once it became clear the court was going to sanction Anthony for his discovery violations, "pleading" with the court to allow him to now comply.

¶ 50 As to the sanction factors, like with Kuper, it is unclear whether Penny would have been surprised by Anthony's testimony, as the undisclosed pertinent financial details to which he would have been testifying are unclear. Although we do not know the undisclosed details, we do know that Anthony would have testified that his financial circumstances had changed such that he could not afford the maintenance payments. Accordingly, the prejudicial effect on Penny of Anthony's testimony could have been great, were she to be blindsided in the middle of a hearing—the crux of which was the parties' finances—by new, previously undisclosed financial information provided by Anthony. As to the third factor, the type of evidence at issue: the evidence was financial information presumably known only by Anthony. It was easily accessible by Anthony, as it was information from his Quickbooks which, according to testimony, he used daily. The specific Quickbooks information sought had the potential to help the court determine whether Anthony was intermingling personal and business expenditures in order to make it appear that his personal finances were in such dire condition that he could no longer pay the court-ordered maintenance. As to the final three factors, diligence of the adverse party, the timely objection to the testimony, and the good faith of the party calling the witness: the record shows that Penny exercised diligence in conducting discovery and was timely in doing so. The record also shows that Anthony, on the other hand, operated in continued bad faith throughout these proceedings and was willingly noncompliant with discovery.

¶ 51 Having carefully reviewed the record before us, we find no evidence that the trial court abused its discretion in barring Anthony's testimony.

¶ 52 Having determined that the trial court did not abuse its discretion in barring the above-discussed testimony and, thus, in denying the motion without an evidentiary hearing, we now turn to whether the denial of the motion to modify or terminate maintenance was an abuse of discretion. Anthony contends the motion should have been granted based on change in circumstances because the "available evidence suggests that Penny's financial circumstances have increased while Anthony's have decreased."

¶ 53 Anthony also argues that this court should reverse the trial court because, in June 2014, a different trial court judge presiding over a contempt proceeding which was called because Anthony was more than $91,000 in arrears for his support payments, did not hold him in contempt because she did not "think [Anthony had] the ability to pay." We disagree. That a different trial court found Anthony may not have had the ability to pay a contempt purge in June 2014 does not mean that the dissolution trial court abused its discretion in determining, first, that the maintenance award was reasonable (which this court subsequently affirmed on appeal, *In re Marriage of Munao*, 2011 IL App (1st) 101153-U (unpublished order under Supreme Court Rule 23)), and second, that Anthony failed to meet his burden to establish a substantial change of circumstance.

¶ 54 Additionally, Anthony argues that the denial of the motion to modify or terminate maintenance was in error due to Penny's changed financial circumstances based on Penny's personal injury award. Specifically, he argues that Penny, who was injured in an automobile accident, received a settlement and, because of that settlement, no longer needs the court-ordered maintenance. Anthony characterizes the settlement as Penny having received

$250,000, while Penny alleges that, after paying fees and satisfying medical liens, she only received approximately $69,000. Regardless, the amount is not at issue here. Rather, we can see from the record that the lawsuit existed prior to the dissolution and the entry of the JDOM. Both parties were aware of the lawsuit, as was the court when it crafted the JDOM dividing the parties' property and maintenance. In fact, Penny was awarded the lawsuit in the division of the parties' property in the JDOM, which specifically stated: "Penny Jo is awarded * * * her lawsuit… ." "[A] maintenance award is *res judicata* only to those facts at the time it is entered, and changed circumstances justifying the modification of maintenance must occur after the award." *In re Marriage of Connors*, 303 Ill. App. 3d at 226. There is no changed circumstance regarding the lawsuit where, although Penny *received* the payment from the lawsuit after the maintenance award was entered, this potential payment was previously awarded to her by the JDOM.

¶ 55 Here, the evidence before us does not show a change of circumstance such that the trial court's denial of the motion to modify or terminate maintenance was an abuse of discretion. Rather, despite an exceptionally long appellate record, there is little actual evidence of any change of circumstance before us. Admittedly, this is due in large part to the testimony of Kuper and Anthony being barred from trial. This, in turn, was due to Anthony's obfuscation and willful noncompliance with discovery. On a motion to modify or terminate maintenance, it is the burden of the party seeking modification to establish a substantial change of circumstances. *In re Marriage of Anderson*, 409 Ill. App. 3d at 198. Anthony has not done so here, and we, therefore, find no abuse of discretion in the trial court's denial of the motion to modify or terminate maintenance.

¶ 56 ii. The Award of Attorney Fees

¶ 57 A. The Appellate Fees

¶ 58 Next, Anthony challenges the trial court's award of attorney fees to Penny for the defense of Anthony's direct appeal. Specifically, Anthony contends the award was an abuse of discretion and against the manifest weight of the evidence where Penny has the ability to pay her own fees from her personal injury recovery; where Anthony no longer earns the high salary he previously earned; and where Anthony no longer owns a business.[2] The contribution award in question required Anthony to pay $24,000 of Penny's attorney fees at $500 per month for 48 months. Anthony argues that either Penny on appeal or the record on appeal was required to demonstrate Anthony's ability to pay and that both failed to do so. We disagree.

¶ 59 Attorney fees are generally the responsibility of the party who incurred the fees. *In re Marriage of McGuire*, 305 Ill. App. 3d 474, 479 (1999); *In re Marriage of Mantei*, 222 Ill. App. 3d 933, 941 (1991) (the primary obligation for the payment of attorney fees rests on the party on whose behalf the services were rendered). However, Section 508 of the Act permits the trial court to order a party to contribute a reasonable amount of the opposing party's attorney fees where one party lacks the financial resources and the other party has the ability to pay. 705 ILCS 5/508 (West 2012). "Any award of contribution to one party from the other party shall be based on the criteria for division of marital property under this Section 503 and, if maintenance has been awarded, on the criteria for an award of maintenance under

[2] Anthony also argues that we should consider: (1) Penny's personal injury lawsuit payment; and (2) a statement by a different trial court during a contempt hearing against Anthony for failure to make payments to Penny pursuant to the JDOM regarding Anthony's ability to pay a contempt purge in our review of the parties' financial circumstances. Because we have previously discussed both of these items and found these arguments unsuccessful, we will not discuss them again here.

Section 504." 750 ILCS 5/503(j)(2) (West 2012). The criteria include the property awarded to each spouse, each spouse's incomes and present and future earning capacities, and "any other factor that the court expressly finds to be just and equitable." See 750 ILCS 5/503(d), 504(a) (West 2012). The amount of attorney fees awarded must be reasonable. *In re Marriage of Hasabnis*, 322 Ill. App. 3d 582, 596 (2001).

¶ 60 The party seeking payment of attorney fees by an ex-spouse must establish her inability to pay and the ex-spouse's ability to do so. *In re Marriage of Schneider*, 214 Ill. 2d 152, 173 (2005); *In re Marriage of Minear*, 181 Ill. 2d 552, 562 (1998) (quoting *In re Marriage of Bussey*, 108 Ill. 2d 286, 299-300 (1985)) ("The propriety of an award of attorney fees is dependent upon a showing by the party seeking them of an inability to pay and a demonstration of the ability of the other spouse to do so."); but see *In re Marriage of Haken*, 394 Ill. App. 3d 155, 162 (2009) (disagreeing with *Schneider* that a contribution award requires a spouse to prove the inability to pay). "Financial inability exists where requiring payment of fees would strip the party [seeking the award] of her means of support or undermine her financial stability." *In re Marriage of Schneider*, 214 Ill. 2d at 174 (citing *In re Marriage of Puls*, 268 Ill. App. 3d 882, 889 (1994)). "When determining an award of attorney fees, the allocation of assets and liabilities, maintenance, and the relative earning abilities of the parties should be considered." *In re Marriage of McGuire*, 305 Ill. App. 3d at 479. This court has explained:

> "A court may consider a party's prospective as well as her or his current income in awarding attorney fees. [Citation.] The spouse seeking the award of attorney fees need not be destitute. [Citation.] It is sufficient that payment would exhaust the

spouse's estate or strip the spouse's means of support or undermine the spouse's economic stability." *In re Marriage of Hasabnis*, 322 Ill. App. 3d at 598.

¶ 61 The court may also consider the conduct of a party as a factor in an attorney fees contribution case. *In re Marriage of Patel*, 2013 IL App (1st) 112571, ¶ 110 (courts may consider whether the amount of attorney fees was the result of the actions of one or both of the parties). Additionally, in considering an award of contribution, a trial court may use its own experience in determining the reasonableness of the fees. *In re Marriage of Patel*, 2013 IL App (1st) 112571, ¶ 110 ("[I]n addition to all the factors a court considers in fashioning a fee award, when necessary, a court may use its own experience to determine the reasonableness of the fee amounts requested.")

¶ 62 The allowance of attorney fees in a dissolution case and the proportion to be paid by each party are within the trial court's discretion and will not be disturbed on appeal absent an abuse of that discretion or unless it is against the manifest weight of the evidence. *In re Marriage of Minear*, 181 Ill. 2d at 561. "An abuse of discretion can be shown in cases where the evidence reveals a gross disparity in income and earning capacity and the financial inability of the spouse seeking relief to pay." *In re Marriage of McGuire*, 305 Ill. App. 3d at 479. " 'In determining whether the trial court abused its discretion, the question is * * * did the trial court in the exercise of its discretion act arbitrarily without the employment of conscientious judgment or, in view of all the circumstances, exceed the bounds of reason and ignore recognized principles of law so that substantial injustice resulted. This is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. It would seem that if reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court

abused its discretion.' " *In re Marriage of Sevon*, 117 Ill. App. 3d 313, 319 (1983), quoting *In re Marriage of Lee*, 78 Ill. App. 3d 1123, 1127 (1979)).

¶ 63 Although the court order by which Anthony was ordered to pay Penny's attorney fees did not specify its findings regarding Anthony's ability to pay the fees, a review of the record establishes his ability to do so. For example, we have reviewed the transcript of the May 23, 2013, purge of indirect contempt of court hearing. Anthony testified at that hearing regarding his finances. He admitted he did not pay Penny the $75,000 for the marital business he was required to pay under the JDOM, he did not hold the business in trust as required, he did not pay Penny the $75,000 for dissipation he was required to pay under the JDOM, and he did not pay Penny maintenance as required under the JDOM. He also admitted he did not pay the court-ordered fees for Penny's attorney. He also testified that, through the bankruptcy that he claimed had been settled and dismissed, he was no longer responsible for his $540,000 mortgage on the house he continued to live in. He testified he purchased a new car in 2013 and was able to qualify for a automobile loan. He also testified to selling or transferring his business and various physical assets of the business such as vehicles and tools to his mother, but admitted that he still had the physical assets in his possession. He testified he owned a new business called VANS Fleet Service.

¶ 64 Based on the record before us, we are unable to say the trial court's order that Anthony contribute to Penny's attorney fees was an abuse of discretion. We note here that the decision on review is from a trial court that had opportunity to observe the parties, including their actions, filings and demeanor, and, ultimately, determined that Anthony violated various rules and filed "improper briefs/filings/arguments" such that Penny's attorneys were required to work more hours and, accordingly, Penny endured higher fees. It is proper for a court to

consider the conduct of a party as a factor in an attorney fees contribution case. See, *e.g.*, *In re Marriage of Patel*, 2013 IL App (1st) 112571, ¶ 110. The trial court in the case at bar did just that: it considered all of the evidence before it, including the testimony it heard and the billing statements submitted in evidence, and used its own experience to determine that Anthony should contribute to Penny's attorney fees.

¶ 65 On the specific facts of this case, then, we cannot say the trial court abused its discretion, that is, we cannot say no reasonable person would have taken the view adopted by the trial court (*In re Marriage of Schneider*, 214 Ill. 2d at 173) or the trial court acted "arbitrarily without the employment of conscientious judgment or, in view of all the circumstances, exceeded the bounds of reason and ignored recognized principles of law so that substantial injustice resulted" (*In re Marriage of Hughes*, 160 Ill. App. 3d 680, 684 (1987)), in ordering Anthony to contribute to Jeanne's attorney fees, limited to fees accrued as to appellate fees for the direct appeal.

¶ 66 B. The Award of Attorney Fees in the Bankruptcy Action

¶ 67 Finally, Anthony contends the trial court's award of contribution by Anthony to Penny's attorney fees in the bankruptcy action was an abuse of discretion. Specifically, Anthony argues that the trial court erred in awarding Penny $5,000 of the $28,846 she sought for her attorney's representation in the bankruptcy case. Anthony argues that section 508 of the Act does not provide for fees in a bankruptcy proceeding. We disagree.

¶ 68 Section 508(b) of the Act provides:

> "(b) In every proceeding for the enforcement of an order or judgment when the court finds that the failure to comply with the order or judgment was without compelling cause or justification, the court shall order the party against whom the

> proceeding is brought to pay promptly the costs and reasonable attorney's fees of the prevailing party… ." 750 ILCS 5/508 (West 2012).

It is "the purpose, not the location, of the proceeding that determines whether section 508 of the Act applies." *In re Marriage of Davis*, 292 Ill. App. 3d 802, 809 (1997).

¶ 69 In the case at bar, when Anthony filed a voluntary bankruptcy action after the dissolution of the parties' marriage, he had already failed to comply with nearly every financial aspect of the JDOM. Penny retained counsel to file an adversary complaint in order to protect her rights under the JDOM, including preventing the bankruptcy court from discharging Anthony's obligations to Penny under the JDOM, as well as challenging Anthony's transfer of his business to his mother as a fraudulent transfer made in violation of the JDOM in order to avoid his court-ordered obligations to Penny. The trial court determined that, although support obligations are not dischargeable in bankruptcy, Anthony had engaged in "shenanigans surrounding the auto repair business" and ordered Anthony to pay $5,000 of Penny's $28,846 in attorney fees.

¶ 70 Anthony was bound to certain obligations through the JDOM. He failed to fulfill those obligations. Penny employed counsel to file an adversary complaint in Anthony's bankruptcy proceeding in order to enforce the court order with which Anthony was not complying. We believe Penny's participation in Anthony's bankruptcy proceeding qualifies as a "proceeding for the enforcement of an order or judgment" under section 508(b) of the Act, for which the trial court properly ordered fees. See 750 ILCS 5/508 (West 2012). On the specific facts of this case, we find no abuse of discretion in the decision of the trial court to order Anthony to pay a small portion of Penny's attorney fees as to the bankruptcy proceedings.

¶ 71 III. CONCLUSION

¶ 72 For all of the foregoing reasons, the decision of the circuit court of Cook County is affirmed.

¶ 73 Affirmed.